Supreme Court, U.S.
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No. 05-

In the Supreme Court of the United States

DETROIT NEWSPAPER AGENCY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is improper, as a matter of law, for the National Labor Relations Board to evaluate the success, rather than the coercive tendency, of employee misconduct and to rely on police intervention to excuse the misconduct of striking employees who, in violation of a Sixth Circuit Court of Appeals Order, gathered *en masse* in an attempt to block the ingress and egress of employer facilities and intimidate non-striking employees.

PARTIES TO THE PROCEEDINGS (RULE 14.1(b))

The following parties appeared before the National Labor Relations Board in the underlying case:

a. Detroit Newspaper Agency d/b/a Detroit Newspapers
b. Local 13 N, Graphic Communications International Union, AFL-CIO
c. Detroit Mailers Union No. 2040, International Brotherhood of Teamsters, AFL-CIO
d. Local 372-International Brotherhood of Teamsters, AFL-CIO
e. Newspaper Guild of Detroit, Local 22, The Newspaper Guild, AFL-CIO
f. Detroit Typographical Union No. 18, Communications Workers of America, AFL-CIO
g. The Detroit News, Inc.
h. Detroit Free Press, Incorporated
i. National Labor Relations Board

The parties in this Court are:

a. Detroit Newspaper Agency d/b/a Detroit Newspapers
b. National Labor Relations Board

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The Detroit Newspaper Agency, now known as Detroit Newspaper Partnership, LP, is a partnership between The Detroit News, Inc. and the Detroit Free Press, Inc. At the time this action was filed, The Detroit News, Inc. was a wholly-owned subsidiary of Gannett Co., Inc. The Detroit News, Inc. is now a wholly-owned subsidiary of MediaNews Group, Inc. At the time this action was filed, The Detroit Free Press, Incorporated was a wholly-owned subsidiary of Knight-Ridder Newspapers, Inc. The Detroit Free Press, Inc. is now a wholly-owned subsidiary of Gannett Co., Inc.

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OPINIONS BELOW

The order of the United States Court of Appeals for the District of Columbia sought to be reviewed was entered on February 7, 2006, affirming the decision of the National Labor Relations Board ("NLRB" or "Board").

Two rulings of the NLRB, the June 30, 2004 and the December 16, 2004 Orders, were appealed to the United States Court of Appeals for the District of Columbia. These final agency decisions are found at 342 N.L.R.B. No. 24 and 343 N.L.R.B. No. 113, respectively.

JURISDICTIONAL STATEMENT

The order of the United States Court of Appeals for the District of Columbia sought to be reviewed was entered on February 7, 2006. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 12.1 because it is being filed within 90 days of the entry of the order sought to be reviewed. This court has jurisdiction to review the order of the United States Court of Appeals for the District of Columbia pursuant to 28 U.S.C. § 1254.

The NLRB had subject matter jurisdiction over this matter pursuant to 29 U.S.C. § 160(a) because it involves allegations that the Detroit Newspaper Agency ("DNA") engaged in unfair labor practices in violation of the National Labor Relations Act ("NLRA"). The United States Court of Appeals for the District of Columbia had subject matter jurisdiction to review a final order of the NLRB pursuant to 29 U.S.C. §160 (e) and (f).

STATUTORY PROVISIONS INVOLVED

The applicable sections of pertinent statutes are set forth below:

29 U.S.C. § 157:

> **Right of employees as to organization, collective bargaining, etc.**
>
> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all of such activities . . . .[1]

29 U.S.C. § 158 (a) (1) and (3):

> **(a) Unfair labor practices by employer**
>
> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment

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[1] The remainder of this section has been omitted because it is not pertinent to this appeal.

to encourage or discourage membership in any labor organization . . . .[2]

STATEMENT OF THE CASE

This case arises out of the July 13, 1995 strike against the DNA by six unions, including the unions representing the three employees at issue here, Douglas McPhail, Michael Youngmeier, and Gary Rusnell. JA. 142; 148-49, 280 (Taylor - 623; Kelleher - 999-1000, 2797) The strike ended in February 1997 when the striking unions made unconditional offers to return to work. JA. 393 (Derey - 5560)

STRIKE VIOLENCE

From the strike's inception, the DNA and its active employees, agents and carriers suffered severe and repeated property damage and were subjected to harassment, threats, intimidation, verbal abuse and assault. Within the first five to ten minutes of the strike, strike supporters attacked trucks as they left the DNA garage, breaking out windows and mirrors. JA. 281, 297 (Kelleher - 2808, 3131) Strike supporters blocked the entrance to the DNA's Lafayette facility as employees attempted to leave the building. JA. 281 (Kelleher - 2808)

Property damage continued throughout the strike. Among other things, strike supporters set fire to the DNA's facilities and equipment, smashed windows at distribution centers, set cars on fire, flattened tires with star nails, broke windows of

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[2] Section 158(a)(2) and the remainder of Section 158(a)(3) have been omitted because they are not pertinent to this appeal.

carriers' cars, damaged and stole newsracks, and crashed automobiles into the doors of the executive garage of The Detroit News Building, damaging the garage doors and blocking ingress and egress to the facility. JA. 273, 274; 281-285, 297; 346 (Kelleher - 2809-10, 2815-16; Zielinski - A2868, A2880; Ochalek - 5202) Demonstrators also threw skunk oil, deer urine or other substances with a vile odor into the DNA's lobby. JA. 290 (Kelleher - 3060)

THE NLRB AND COURT ORDERS

The extreme violence, property damage and other misconduct quickly led to NLRB and court intervention. On September 13, 1995, Macomb County Circuit Court, the Michigan State Court in the county where one of the DNA's production facilities is located, entered an Order enjoining the striking unions, their members and representatives from engaging in further illegal misconduct. JA. 458 (R 294 - Macomb County Circuit Court Order of Preliminary Injunction) The injunction established procedures to eliminate the unions' blocking of ingress and egress to DNA facilities and prohibited the violence and property damage that had been occurring during the strike. *Id.*

Despite the State Court injunction, the violence, property damage, blocking and illegal misconduct continued. Over one year later, on July 24, 1996, the NLRB issued an Order requiring the striking unions, as well as their officers, agents and representatives to cease and desist from coercing, threatening, blocking or engaging in acts of violence against any employees of the DNA. JA. 441 (R 24 - NLRB Settlement Agreement) The unions failed to comply with the NLRB Order, prompting the NLRB to seek an order from the United States Court of Appeals for the Sixth Circuit demanding compliance with its July 24, 1996 Order. On

August 16, 1996, the Sixth Circuit enforced the Board's order, requiring that the unions, "their officers, agents and representatives, shall abide by and perform the directions in said order contained." JA. 416 (R 3 - Sixth Circuit Order)

UNFAIR LABOR PRACTICE CHARGES

Beginning on January 12, 1996, the unions representing the employees who had been discharged by the DNA, The Detroit News, Inc. and the Detroit Free Press, Incorporated for engaging in strike misconduct filed unfair labor practice charges with the NLRB alleging that 96 of the terminated employees were not discharged for misconduct but were instead discharged in violation of Section 8(a)(3) and (1) of the NLRA because they engaged in protected concerted activity. The final consolidated complaint alleged that the DNA, the News and the Free Press discriminated against the named alleged discriminatees because they assisted the charging unions and engaged in a strike against the three employers. JA. 406-407 (GC 83(B), Ex. B - Consolidation of Prior Consolidated Complaints, ¶ 16-21)

Following a hearing that spanned nearly one and one-half years, ALJ Richard Scully issued his Decision and Recommended Order on December 17, 1999, finding, *inter alia*, that the DNA had discharged various individuals because of their membership in or activities on behalf of a labor organization. Other discharges by the DNA for misconduct were upheld by both ALJ Scully and the Board as lawful. The DNA timely filed exceptions to certain portions of the ALJ Decision, and on June 30, 2004, the NLRB affirmed the ALJ's rulings. Among the incidents at issue in the NLRB trial were the August 29, 1996 and August 30, 1996 blocking of the DNA's Hayes Distribution Center and Detroit News Building.

THE AUGUST 29, 1996 HAYES MASS BLOCKING INCIDENT

On August 29, 1996, just 13 days after the Sixth Circuit entered its Order, approximately 50 to 60 union supporters picketed the two driveways leading into the DNA's Hayes Distribution Center in Roseville, Michigan. JA. 322 (McLogan - 5097) By means of their tight, unyielding formation and a cement parking block measuring approximately six feet long by eight inches high by 18 inches wide, the protesters restrained and coerced numerous non-striking employees and contractors by preventing them from entering and/or exiting the Hayes facility. JA. 210; 314, 315-316; 342 (Karpinen - 2595; McLogan - 5071; 5073-74; Alqirsh - 5140) The pickets can be heard on videotape demonstrating a clear intent to block by chiding carriers with comments such as, "[k]eep going, scabby - we're closed", "[s]omebody's going to be late for their next delivery" and "[n]o scabs allowed." JA. 479; 480; 480 (GC 130 - Video 1394; GC 131 - Video 1395; GC 132 - Video 1396)

Ultimately, 20 to 30 police officers were required to intervene so that non-striking carriers and other employees could pass through the mass of pickets into or out of the Hayes facility. JA. 245 (Zielinski - A2779) The DNA discharged 22 individuals, including Douglas McPhail and Michael Youngmeier, for their participation in the mass blocking. The discharge letters issued to these employees explained that they were being discharged for "physically block[ing] ingress and egress of traffic to the Hayes Street Distribution Center" and that their misconduct was not protected by the Act and violated "a formal NLRB Settlement Agreement prohibiting such behavior." JA. 411, 413 (See GC 171 - McPhail discharge letter, 193 - Youngmeier discharge letter)

THE AUGUST 30, 1996 MASS BLOCKING INCIDENT

On August 30, 1996, just 14 days after the Sixth Circuit entered its order, Gary Rusnell and numerous other striking employees ended a demonstration in front of The Detroit News Building by engaging in a mass sit-in that effectively blocked all ingress and egress to the only public entrance to the building. From approximately 9:00 a.m. until some time after noon, the discharged employees and approximately 350 strike supporters gathered in front of The Detroit News Building and engaged in a mass demonstration. JA. 145; 170; 192; 219 (Taylor – 841; DeSmet – 2098, 2130; Everett – 2497; D. Mills – 2678) Strike supporters "took over the front stoop of" the building, set up a podium and microphone and used the area as a platform to address the crowd of union supporters. JA. 229; 195; 378 (DeSmet – 2129; D. Mills – 2692; Everett – 2535; Attard – 5484).

At about 11:50 a.m. that morning, approximately 50 strikers and union supporters, including Gary Rusnell, accomplished a complete blocking of the front entrance to The Detroit News Building when they sat down on the steps, on the stoop and on the ramp leading to the entrance and remained there for at least 30 minutes, demonstrating a clear, concerted intent to prevent individuals from even approaching the building. JA. 171, 179, 184; 194; 292; 190; 384; 235; 187; 449; 450; 451-452; 453; 465-477 (DeSmet – 2099, 2126, 2189; Everett – 2516; Kelleher – 3063; Lengel – 2399; Young – 5505; M.J. Mills – 2703; Ourlian – 2306; R 25 - Guild Reporter photo; R 26 - Sunday Journal photo; R 27 - Voices of the Strike photo; R 28 - CWA News Photo; R 373-85 - Labor Day photos) At one point, there were 21 people sitting on the steps preventing customers from gaining entrance to the front doors. JA. 228 (D. Mills – 2690)

Photographs confirm that a crowd gathered on the ramps during the mass sit-in. JA. 449; 450 (R 25; R 26).

Several times police warned the individuals sitting at the entrance to the building that they were blocking ingress and egress at the building and that they should move or risk being arrested. JA. 372, 373; 180; 230; 236; 369 (Attard - 5472, 5477; DeSmet - 2133; D. Mills - 2694; M.J. Mills - 2704; Howe - 5453) Many of the individuals refused to move, however, and were arrested for blocking. JA. 182; 224; 369; 381; 385; 465-70 (DeSmet - 2142; D. Mills - 2683; Howe - 5453; Attard - 5489; Young - 5508; R 373-78) According to Lt. Noetzel, "individuals sitting, blocking ingress and egress" were arrested for "violating the state laws in regard to picket action" and "blocking ingress and egress of the building." JA. 351, 356 (Lt. Noetzel - 5305, 5312) The DNA discharged every individual whom it conclusively determined sealed off the entrance to the building on August 30 by sitting on the steps, the stoop or the ramps leading to the building's front entrance. JA. 366-67 (Taylor - 5395-96) The DNA discharged eight individuals, including Gary Rusnell, for his participation in the August 30, 1996 mass blocking. JA. 412 (GC 182 - Rusnell discharge letter) Rusnell and the other individuals were informed in their termination letters that they were discharged for blocking ingress and egress to the front entrance of the News building. JA. 412 (GC 182 - Rusnell discharge letter) They were also informed that in addition to engaging in activity unprotected by the Act, their conduct was "even more egregious in that it violates a formal NLRB Settlement Agreement prohibiting such behavior." Id.

Shortly after the August 30, 1996 mass sit-in, striking employee Robert Ourlian wrote the following in an article in The Detroit Sunday Journal, a striker publication:

> Friday's action was an *obvious violation* of last month's settlement between the striking unions and the National Labor Relations Board, which governs picket line conduct. When ... labor leaders *blocked the doors* of the Detroit News, *they cut off access to the front of the building*. . . .

JA. 462-63 (R 338 - Sunday Journal article; emphasis added) Ourlian's article revealed the true motivation behind the mass sit-in: to "cut off access" to the News building by blocking the doors and to act in blatant violation of the NLRB Settlement Agreement.

THE BOARD'S AND COURT OF APPEALS' HOLDINGS

In the case of the August 29, 1996 Hayes blocking, the Board erroneously found that "[t]here is no evidence that at that point there had been any violence or that they [the pickets] had actually prevented anyone from entering or leaving...." APX. 259a;(NLRB Order, p. 67) and that "as a result of the procedures set up by the police official in charge . . . some of those seeking to enter the facility may have been delayed in doing so." APX. 259a (NLRB Order, p. 67). The Board therefore concluded that the DNA violated Section 8(a)(3) of the Act by discharging McPhail and Youngmeier.

In the case of the August 30, 1996 Detroit News Building blocking, the Board erroneously found that no one was prevented from entering or leaving the building, that there were other doors through which persons could enter the building, that the individuals participating in the mass sit-in did not intend to disrupt business at The Detroit News Building and that blocking the ramps was a "moot point." APX. 276a (NLRB Order, p. 72; 72 n. 110).

The Court of Appeals for the District of Columbia Circuit granted the Board's petition for summary enforcement, holding that the Board "properly identified and applied the test set forth in *Clear Pine Moldings, Inc.*, 268 N.L.R.B. 1044 (1984)" which held that striking employees may not engage in conduct that "may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Id.* at 1046.

REASONS FOR GRANTING THE PETITION

In enforcing the Board's order, the Court of Appeals for the District of Columbia Circuit ignored well-established law that that striker misconduct should not be evaluated by its success and should not be excused by police intervention.

I. STRIKER MISCONDUCT IS NOT MEASURED BY SUCCESS

The Court of Appeals enforced the Board's Order despite the fact that it was based in part on the finding that there was no evidence of any violence or that the blocking activities of striking employees actually prevented anyone from entering or leaving the Hayes and Detroit News facilities. Although this conclusion ignores substantial evidence in the record, this Court should grant the Petition because this conclusion is based on an incorrect legal standard.

It is well established that blocking of ingress and egress violates the Act, even where the blocking is caused by picketing that is nonviolent in nature. Indeed, the United States Supreme Court in *Hughes v. Superior Court*, 339 U.S. 460, 466 (1950), noted that even in the absence of actual violence, picketing can take place "in numbers that of themselves carry a threat of violence."

Addressing picket line misconduct in *Newport News Shipbuilding & Dry Dock v. N.L.R.B.*, 738 F.2d 1404, 1411 (4th Cir. 1984), the court held that "it is not the egregiousness of the conduct that matters, . . . but whether [the] conduct is intended to threaten or intimidate nonstrikers." Similarly, in *Pullman Incorporated v. N.L.R.B.*, 407 F.2d 1006, 1018 (5th Cir. 1969), the court concluded that a finding of actual violence was not required in order to uphold the discharge of a striker accused of physically assaulting a nonstriking employee. According to the court, it was "sufficient to justify the employer in denying the status of employee to the misbehaving striker" that the striker engaged in conduct that was "calculated to put a non striker in fear of bodily harm." *Id.* at n. 7. *See also*, *Service Employees International Union Local 525*, 329 N.L.R.B. No. 64 (1999) ("nonviolent conduct, including efforts to prevent employees from reporting to work by impeding access to an employer's facility also is proscribed by this section"); *Metal Polishers*, 200 N.L.R.B. 335, 336 n. 10 (1972) (Board disagreed with ALJ's finding that no blocking occurred at a "peaceful" picket site, concluding that "[t]he absence of physical violence does not lessen the restraining effect of Respondent's conduct.").

It is also clear that pickets need not actually be successful in their blocking efforts in order for a violation of the Act to be found. In *N.L.R.B. v. United Mine Workers*, 429 F.2d 141 (3d Cir. 1970), the court considered whether members of one union engaged in an unfair labor practice by means of mass picketing when they attempted to prevent a rival union from meeting with nonunion employees about joining the rival union. The court concluded that:

> [T]he massing of large numbers of men outside the SLU meeting place was itself [an unfair labor

> practice]. It need not be shown that the massing of pickets in fact achieved its intended result in order to establish a violation of Section 8(b)(1)(A). . . . The test of coercion and intimidation is not whether the misconduct proves effective. The test is whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.

Id. at 146. See also, *Local #1150, United Electrical, Radio & Machine Workers*, 84 N.L.R.B. 972 (1949) (" [T]he Act [does not] require that the Respondents' efforts to prevent employees from entering or leaving the plant be successful."); *Service Employees International Union Local 525, AFL-CIO et al.*, 329 N.L.R.B. No. 64 (1999) ("[e]ven where blocking is not altogether successful, the act of amassing a hostile crowd at a building's entrance in a confrontational manner is, in itself, coercive."); *Metal Polishers*, 200 N.L.R.B. 335, 336 n. 10 (1972) (Board disagreed with ALJ's finding that "a delay of one to five minutes under peaceful circumstances hardly constitutes blocking or barring ingress so as to constitute a violation of the Act").

The Circuit Court of Appeals for the District of Columbia therefore erred in holding that the NLRB applied the correct legal standard in determining that the DNA violated Sections 8(a)(3) and (1) of the Act in discharging McPhail, Youngmeier and Rusnell because they were not successful in their efforts to block ingress and egress at the DNA's facilities, misconduct which violated NLRB and Sixth Circuit Orders.

II. POLICE INTERVENTION DOES NOT EXCUSE STRIKER MISCONDUCT

The Court of Appeals enforced the Board's Order despite the fact that it was based in part on a finding that police intervention during the Hayes blocking incident resulted in certain ingress and egress procedures that may have delayed some of those seeking to enter the Hayes facility. The Petition should be granted because this conclusion is based on an incorrect legal standard.

It is well-established that the ability of police to intervene and facilitate ingress and egress at a picketed facility does not excuse misconduct for blocking. In *Newport News Shipbuilding & Dry Dock v. N.L.R.B.*, 738 F.2d 1404, 1411 (4th Cir. 1984), the court examined whether or not certain striking employees engaged in an unfair labor practice by means of mass picketing and other intimidation tactics. While working on the picket line, one striker blocked the path of a nonstriking employee who was attempting to cross the picket line, and called him a "m----- f-----." The employee attempted to avoid the striker by walking around him, but the striker again moved in front of the employee and would not let him pass. It was only after a police officer cleared a path for the employee that the employee was able to enter the worksite. While the Board concluded that the striker's conduct was not serious enough to justify discharge, the court disagreed:

> Although briefly blocking a shipyard entrance may be considered only minor misconduct, Holmes never voluntarily allowed the nonstriker to pass. But for the intervention of police, the nonstriker was faced with the choice of either turning back or fighting on. By placing the nonstriker in this dilemma, Holmes clearly exhibited an intent to intimidate or coerce. *The*

> *prompt reaction of a nearby police officer does not negate this intent.*

Id. at 1410-11 (emphasis added). *See also*, *Local #1150, United Electrical, Radio & Machine Workers*, 84 N.L.R.B. 972, 975-76 (1949) ("the Act does not require that employees exercising their right to refuse to support the strike enlist the assistance of the police to gain access to and from the plant.").

In the instant case, the tight, unyielding formation of the pickets as well as the comments they made about delaying carriers and "no scabs allowed" establish that their picketing "was calculated or tended to bar employees' ingress and egress." *Id.* The fact that police intervention was required supports a determination that the pickets intended to block the facility.[3] In light of the foregoing, the Court of Appeals for the District of Columbia Circuit erred in enforcing the Board's determination that police intervention excused the strikers' misconduct.

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[3] Such blocking violated the Sixth Circuit Order of August 16, 1996, and the employer's decision to terminate the employee in these circumstances was not because of their protected activity, but rather activity prohibited by the NLRB Settlement Agreement and the Order of the Sixth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1439
Consolidated with 05-1013

[Filed February 7, 2006]

DETROIT NEWSPAPER AGENCY, D/B/A DETROIT NEWSPAPERS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

Before: GINSBURG, Chief Judge, RANDOLPH, Circuit Judge, and EDWARDS, Senior Circuit Judge.

JUDGMENT

This appeal was considered on the record from the National Labor Relations Board and on the briefs and

arguments of the parties. It is

ORDERED AND ADJUDGED that the Detroit Newspaper Agency's petition for review be denied, and that the order of the Board be enforced in full.

The Detroit Newspaper Agency contends the NLRB erred in holding it violated sections 8(a)(1) and (a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (a)(3), by disciplining and discharging employees Douglas McPhail, Michael Youngmeier, Gary Rusnell, and Larry Skewarczynski. Our review "is limited to determining whether the Board's findings of fact are supported by substantial evidence" in the record as a whole, and if so, "whether the Board acted arbitrarily or otherwise erred in applying established law to the facts" of this case. *Stanford Hosp. & Clinics v. NLRB,* 361 U.S. App. D.C. 486, 370 F.3d 1210, 1212 (D.C. Cir. 2004).

The Board's findings are supported by the testimony of multiple witnesses, as well as by other direct evidence. Although the DNA argues the Board applied an incorrect legal standard under which it evaluated the success, not the coercive tendency, of the employees' activities and used police intervention to "excuse[]" employees' misconduct, the Administrative Law Judge's decision, which the Board adopted, properly identified and applied the test set forth in *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044 (1984). *See also Va. Holding Corp.*, 293 N.L.R.B. 182, 217 (1989) (employees' participation in picket disrupting traffic not "of itself particularly serious misconduct"). Furthermore, Mr. Skewarczynski's activity was not so serious as to require the Board, under its precedents, to conclude he engaged in unprotected activity.

The DNA does not contest the Board's findings regarding employees Floyd Davis, Jr., Anthony Edwards, Steven Montagne, and Harry Thompson. Accordingly, we grant the Board's petition for summary enforcement of its order regarding these employees.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

APPENDIX B

NATIONAL LABOR RELATIONS BOARD

December 16, 2004

Cases 7-CA-38079, 7-CA-38260, 7-CA-38320, 7-CA-38321, 7-CA-38322, 7-CA-38347, 7-CA-38393, 7-CA-38457, 7-CA-39008, 7-CA-39119, 7-CA-39401, 7-CA-39523, 7-CA-38081, 7-CA-38118, 7-CA-39596, 7-CA-38313, 7-CA-38812, 7-CA-39105, 7-CA-39435, 7-CA-39436, 7-CA-39550, 7-CA-39570, 7-CA-39574. 7-CA-39593, 7-CA-39594, 7-CA-39850, 7-CA-40008, 7-CA-38367, 7-CA-38487, 7-CA-38545, 7-CA-38552, 7-CA-38706, 7-CA-39396, 7-CA-39548, 7-CA-39597, 7-CA-39813, 7-CA-39966, 7-CA-40086, 7-CA-40226, 7-CA-38509, 7-CA-39894, 7-CA-39549, 7-CA-39610, 7-CA-39901, 7-CA-38216, 7-CA-38338, 7-CA-39118, 7-CA-39377, 7-CA-39525, 7-CA-39895, 7-CA-40024, 7-CA-40118, 7-CA-40283, 7-CA-39526

Detroit Newspaper Agency, d/b/a Detroit Newspapers and Local Union 13N, Graphic Communications International Union, AFL-CIO and Detroit Mailers Union No. 2040, International Brotherhood of Teamsters, AFL-CIO; Local No. 372, International Brotherhood of Teamsters, AFL-CIO and Detroit Mailers Union No. 2040, International Brotherhood of Teamsters, AFL-CIO and Local No. 372, International Brotherhood of Teamsters, AFL-CIO and	)

Newspaper Guild of Detriot Local 22,	)
the Newspaper Guild and Detroit Typographical	)
Union No. 18, Communications Workers of America	)
and The Detroit News, Inc., and Newspaper Guild of	)
Detroit, Local 22, The Newspaper Guild, and	)
The Detroit Free Press and Newspaper Guild of	)
Detroit, Local 22, The Newspaper Guild	)
	)

ORDER GRANTING MOTION FOR RECONSIDERATION

By Wilma B. Liebman, Member; Peter C. Schaumber, Member; Dennis P. Walsh, Member

On June 30, 2004, the National Labor Relations Board issued a Decision and Order in this proceeding finding, in relevant part, that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging a number of economic strikers, either without a good faith belief that they had committed strike misconduct or where the strikers had not in fact committed the acts relied upon for the discharges.[1] *NLRB v. Burnup & Sims*, 379 U.S. 21, 22 (1964).

On July 14, 2004, the Charging Parties filed a Motion for Reconsideration. On July 29, 2004, the General Counsel filed his own Motion for Reconsideration. The Respondents Detroit News and Detroit Newspaper Agency filed oppositions to the motions.

The Board has delegated its authority in this proceeding to a three-member panel.

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[1] 342 NLRB No. 24 (2004).

The Board has decided to grant the Motions for Reconsideration. Section 102.48(d)(1) of the Board's Rules and Regulations provides that a party may, because of "extraordinary circumstances," move for reconsideration of a Board decision, and that the moving party must "state with particularity the material error claimed." We agree with the contention of the General Counsel and the Charging Parties that the Board inadvertently made a material error with respect to the appropriate remedy and order for the unfair labor practices found. We correct our decision accordingly.

In ordering the remedy for the unlawful discharges, the Board stated that the discriminatees should be reinstated with backpay from the dates of their discharges, unless they had been permanently replaced before the Union made its unconditional offer to return to work in February 1997. In the latter event, the discriminatees would be afforded the rights of permanently replaced economic strikers under *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

The General Counsel and the Charging Parties correctly argue that the Board erred in focusing on whether the discriminatees were permanently replaced before or after the Unions' unconditional offer to return, and not on whether they were lawfully permanently replaced before they were discharged. Thus, the Board inaccurately treated the discriminatees as merely economic strikers rather than as unlawfully discharged strikers. Unlawfully discharged strikers are entitled to reinstatement and backpay running from the dates of their discharges regardless of when, or even if, they made an unconditional offer to return to work. *Abilities and Goodwill,* 241 NLRB 27 (1979), enf. denied on other grounds 612 F.2d 6 (1st Cir. 1979). If the strikers were lawfully

permanently replaced[2] before they were *discharged,* however, their rights to reinstatement and backpay are contingent on the departure of the employees who replaced them. *Hormigonera Del Toa, Inc.,* 311 NLRB 956, 957-958 & fn. 3 (1993).

Thus, under *Abilities and Goodwill* and *Hormigonera Del Toa, Inc.,* supra, the discriminatees' entitlement to reinstatement and backpay depends on whether they were lawfully permanently replaced before their unlawful discharges, or after. Specifically: (1) if a striker is unlawfully discharged and *then* permanently replaced, he is entitled to immediate reinstatement and backpay running from the date of the discharge (regardless of when, or if, he unconditionally offers to return to work); (2) if the striker is lawfully permanently replaced *before* being discharged, he is entitled to reinstatement upon the departure of his replacement, with backpay running from the date of the replacement's departure.[3]

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[2] I.e., replaced prior to making an unconditional offer to return to work.

[3] *Hormigonera Del Toa, Inc.,* supra, 311 NLRB at 957 fn. 3. However, if he is permanently replaced *before* the discharge but *after* making an unconditional offer to return to work, the replacement is unlawful, and the discriminatee is again entitled to immediate reinstatement and full backpay.

In this case, the Board inadvertently provided an inaccurate discussion of the discriminatees' right to relief.[4] We shall correct our Decision and Order accordingly.

Accordingly, we shall grant the Charging Parties' and General Counsel's motions and modify our Decision and Order as set out below.[5]

ORDER

The Charging Parties' and General Counsel's Motions for Reconsideration are granted. Accordingly, the Board's Decision and Order is modified, and the Respondent, Detroit Newspaper Agency, d/b/a Detroit Newspapers, Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for the last sentence in the first partial paragraph and the first and second full paragraphs on page 3 of the decision.

> "Consequently, we revise the judge's recommended remedy and Order to grant the

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[4] In *Detroit Newspapers*, 340 NLRB No. 121 (2003) in which we used similar language, the relevant discharges occurred after the Union's unconditional offer to return in February 1997. In those circumstances, any striker who was replaced before the Union made its offer was necessarily replaced before he was discharged. Accordingly, we do not need to correct the remedy in that case.

[5] Member Schaumber would not include Larry Skewarczynski in the below Order because he did not find his discharge unlawful in the earlier decision.

discriminatees the rights of unlawfully discharged economic strikers.

"Unlawfully discharged economic strikers are entitled to immediate reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent positions, and to receive backpay running from the dates of their unlawful discharges until they are offered reinstatement, unless they were lawfully permanently replaced before they were discharged. *Abilities and Goodwill,* 241 NLRB 27 (1979), enf. denied on other grounds 612 F.2d 6 (1st Cir. 1979). Any discriminatees who were lawfully permanently replaced before they were unlawfully discharged are entitled to full reinstatement to their former positions on a nondiscriminatory basis either upon the departure of the permanent replacements or, if those positions no longer exist, to substantially equivalent positions, unless they have in the meantime acquired other regular and substantially equivalent employment or the employer can show that it failed to offer reinstatement for legitimate and substantial business reasons. *Hormigonera Del Toa, Inc.,* 311 NLRB 956, 957-958 & fn. 3 (1993); *Rose Printing Co.,* 304 NLRB 1076 (1991). Such individuals are not owed backpay for any period of time in which their replacements continued in the employer's employ during the backpay period.

"In accordance with these principles, we shall order the Respondent to offer to reinstate Floyd Davis, Jr., Anthony Edwards, Douglas McPhail, Steven Montagne, Gary Rusnell, Larry Skewarczynski, Harry Thompson, and Mike Youngmeier immediately to their former positions. In

the event that Respondent lawfully permanently replaced any of them prior to their unlawful discharges, the Respondent shall place them on a preferential hiring list, based on seniority, or some other nondiscriminatory basis, for employment as jobs become available. The strikers shall be made whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges, in the manner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in accordance with *New Horizons for the Retarded,* 283 NLRB 1173 (1987)."[6]

2. Substitute the following for paragraph 2(a):

"(a) Within 14 days from the date of this Order, offer Floyd Davis, Jr., Anthony Edwards, Douglas McPhail, Steven Montagne, Gary Rusnell, Larry Skewarczynski, Harry Thompson, and Mike Youngmeier full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, if they were not lawfully permanently replaced prior to their unlawful discharges, dismissing if necessary any replacements hired thereafter. If no employment is available for the discriminatees, or if

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[6] In regard to striker Anthony Edwards, Respondent DNA offered to reinstate him on April 23, 1996, but he refused. While Edwards was within his rights to reject this offer and continue his strike, his backpay should be tolled for the period between the offer of reinstatement and the date when the Respondent failed to offer him the reinstatement rights extended to the other returning strikers. See *Abilities and Goodwill,* 241 NLRB 27 fn. 5 (1979).

they were lawfully permanently replaced before being unlawfully discharged, they shall be placed on a preferential hiring list based on seniority, or some other nondiscriminatory test, for employment as jobs become available."

3. Substitute the attached notice for that in the Decision and Order.

Dated, Washington, D.C. December 16, 2004

/s/_____
Wilma B. Liebman, Member

/s/_____
Peter C. Schaumber, Member

/s/_____
Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD
APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discourage our employees' activity on behalf of a labor organization by discharging striking employees, without an honest belief that they had engaged in serious misconduct, or where they had not engaged in serious misconduct.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Floyd Davis, Jr., Anthony Edwards, Douglas McPhail, Steven Montagne, Gary Rusnell, Larry

Skewarczynski, Harry Thompson, and Mike Youngmeier, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, if they were not lawfully permanently replaced before their unlawful discharges, dismissing if necessary any replacements hired thereafter. If no employment is available for the discriminatees, or if they were lawfully permanently replaced before being unlawfully discharged, WE WILL place them on a preferential hiring list based on seniority, or some other nondiscriminatory test, for employment as jobs become available.

WE WILL make Floyd Davis Jr., Anthony Edwards, Douglas McPhail, Steven Montagne, Gary Rusnell, Larry Skewarczynski, Harry Thompson, and Mike Youngmeier whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Floyd Davis, Jr., Anthony Edwards, Douglas McPhail, Steven Montagne, Gary Rusnell, Larry Skewarczynski, Harry Thompson, and Mike Youngmeier, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

DETROIT NEWSPAPER AGENCY
D/B/A DETROIT NEWSPAPERS

APPENDIX C

NATIONAL LABOR RELATIONS BOARD

[Filed June 30, 2004]

Cases 7-CA-38079, 7-CA-38260, 7-CA-38320, 7-CA-38321, 7-CA-38322, 7-CA-38347, 7-CA-38393, 7-CA-38457, 7-CA-39008, 7-CA-39119, 7-CA-39401, 7-CA-39523, 7-CA-38081, 7-CA-38118, 7-CA-39596, 7-CA-38313, 7-CA-38812, 7-CA-39105, 7-CA-39435, 7-CA-39436, 7-CA-39550, 7-CA-39570, 7-CA-39574, 7-CA-39593, 7-CA-39594, 7-CA-39850, 7-CA-40008, 7-CA-38367, 7-CA-38487, 7-CA-38545, 7-CA-38552, 7-CA-38706, 7-CA-39396, 7-CA-39548, 7-CA-39597, 7-CA-39813, 7-CA-39966, 7-CA-40086, 7-CA-40226, 7-CA-38509, 7-CA-39894, 7-CA-39549, 7-CA-39610, 7-CA-39901, 7-CA-38216, 7-CA-38338, 7-CA-39118, 7-CA-39377, 7-CA-39525, 7-CA-39895, 7-CA-40024, 7-CA-40118, 7-CA-40283, 7-CA-39526

Detroit Newspaper Agency, d/b/a Detroit	)
Newspapers and Local Union 13N, Graphic	)
Communications International Union, AFL-CIO	)
and Detroit Mailers Union No. 2040,	)
International Brotherhood of Teamsters, AFL-CIO;	)
Local No. 372, International Brotherhood of	)
Teamsters, AFL-CIO and Detroit Mailers Union	)
No. 2040, International Brotherhood of Teamsters,	)
AFL-CIO and Local No. 372, International	)
Brotherhood of Teamsters, AFL-CIO and	)

Newspaper Guild of Detriot Local 22,)
the Newspaper Guild and Detroit Typographical)
Union No. 18, Communications Workers of America)
and The Detroit News, Inc., and Newspaper Guild of)
Detroit, Local 22, The Newspaper Guild, and)
The Detroit Free Press and Newspaper Guild of)
Detroit, Local 22, The Newspaper Guild)
)

DECISION AND ORDER

By Wilma B. Liebman, Member; Dennis P. Walsh, Member; Peter C. Schaumber, Member

On December 17, 1999, Administrative Law Judge Richard A. Scully issued the attached decision. The Respondents Detroit Newspaper Agency, d/b/a Detroit Newspapers (DNA) and Detroit News (News) jointly filed exceptions and a supporting brief, and the Respondent Detroit Free Press (Free Press) filed separate exceptions and a supporting brief.[1] The Newspaper Guild of Detroit, Local 22 (Guild) and Local Union 13N GCIU (GCIU) jointly filed a single answering brief to both sets of exceptions. The General Counsel filed cross-exceptions and a supporting brief; Detroit Mailers Union No. 2040 (Mailers), Local No. 372, International Brotherhood of Teamsters (Teamsters) and Typographical Union No. 18 (Local 18) jointly filed cross-exceptions and a supporting brief; and the Guild and GCIU jointly filed cross-exceptions and a supporting brief. DNA and

[1] DNA is a joint operating partnership of two Detroit area newspapers (the Respondents News and Free Press). DNA performs the two newspapers' noneditorial functions including printing, distribution, sale of advertising, and promotion.

News filed separate answering briefs to the cross-exceptions of the General Counsel and the Charging Party Unions. The Free Press filed an answering brief to the General Counsel's and the Guild/GCIU's exceptions. The Guild and GCIU filed an answering brief to the Respondents' exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.[3]

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[2] The parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] Member Schaumber disagrees with his colleagues' order to the extent it requires Respondent to cease and desist from discouraging its employees' activity on behalf of a labor organization by discharging striking employees . . . where they had not engaged in serious misconduct." For the reasons he expressed in his partial dissenting opinion in *Detroit Newspapers*, 340 NLRB No. 121 (2003). Member Schaumber finds such an order incapable of being complied with without impermissibly chilling lawful conduct. An employer cannot lawfully be enjoined from disciplining an employee in the future based on the employer's reasonable good faith belief that the employee is engaged in serious misconduct. He would revise the order in a manner consistent with the order he suggested in *Detroit Newspapers*, supra.

The judge found, inter alia, that the Respondents had violated Section 8(a)(3) and (1) of the Act by discharging a number of strikers, either without a good faith belief that they had committed serious strike misconduct or where the strikers had not in fact committed the acts relied upon for their discharge. *NLRB v. Burnup & Sims,* 379 U.S. 21, 22 (1964).

Since the judge issued his decision, the parties have entered into a series of non-Board settlements, which have resolved all but 10 of the allegations contained in the consolidated complaint.[4] All of the remaining allegations are directed against DNA. These allegations concern the discharges of strikers Floyd Davis Jr., Anthony Edwards, Douglas McPhail, Steven Montagne, Gary Rusnell, Larry Skewarczynski, Ben Solomon, Harry Thompson, and Mike Youngmeier, and a warning issued to Gene Schroll. We affirm the judge's findings regarding these allegations for the reasons stated in his decision.[5] We modify the Order and

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[4] On May 26, 2000, the Board granted the Teamsters' motion to withdraw and DNA's motion to sever Case 7-CA-39813 concerning the discharges of strikers Romanowski, Macelt, Earnest, and Adams. On September 13, 2001, the Board granted the motion of the Free Press and Local 22 to remand Case 7-CA-39526 for settlement concerning the discharges of strikers Dunn. Everett, Hartley, Manoleas, Watson, and Waldman. On August 20, 2003, the Board granted the General Counsel's motion to sever the cases of all but ten strikers from these proceedings, approve the Charging Parties' request to withdraw the relevant charges, and dismiss the corresponding complaint allegations.

[5] In the cases of strikers Davis, Edwards, Montagne, and Thompson, we adopt the judge's findings of violations, in the absence of exceptions. In adopting the judge's finding that the General Counsel failed to establish that striker Solomon did not engage in the misconduct for which he was discharged, we do not

notice to reflect the settlement of the other charges.

Discharge of Skewarczynski

As the judge correctly observed, not all strike misconduct is sufficient to disqualify a striker from further employment. The test is whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act. *Clear Pine Mouldings,* 268 NLRB 1044, 1046 (1984), enfd. 765 F.2d 148 (9th Cir. 1985). In agreement with the judge, and contrary to our colleague, we find that the conduct of strikers Larry Skewarczynski was not sufficiently egregious to bar his reinstatement.

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rely on the judge's erroneous statement that another striker was not called to verify Solomon's story.

The judge found that several of the strikers were discharged in violation of Sec. 8(a)(3) and (1). In the cases of strikers Davis, McPhail, Montagne, Skewarczynski, and Youngmeier, the judge found that although the Respondent possessed a good-faith belief that these strikers had committed serious strike misconduct, they had not in fact done so. See *NLRB v. Burnup & Sims,* 379 U.S. 21, 22 (1964). In the case of striker Rusnell, the judge found that the Respondent did not have a good-faith belief that Rusnell and the other strikers involved in the incident committed serious misconduct and that, in fact, their actions did not constitute serious misconduct. We find that the discharges of these strikers violated Sec. 8(a)(1), but find it unnecessary to decide whether the discharges also violated Sec. 8(a)(3). The finding of an 8(a)(3) violation would not materially affect the remedy. *Tri-County Mfg. & Assembly,* 335 NLRB 210 fn. 1 (2001); *Ideal Dyeing & Finishing Co.,* 300 NLRB 303 fn. 5 (1990), enfd. 956 F.2d 1167 (9th Cir. 1992).

The Respondent terminated Skewarczynski because it believed that while on the picket line Skewarczynski had squirted a liquid into the eyes of security guard Jeffrey Spurlock that caused a stinging sensation. Spurlock did not testify, and the judge credited Skewarczynski's version of what occurred. Based on Skewarczynski's credited testimony, he filled a water pistol with drinking water provided by the Lincoln Park Fire Department, and used the water pistol to squirt various people on the picket line (including fellow strikers), and to give himself a drink of water. One of the people whom he squirted was Spurlock. Specifically, Skewarczynski testified that he felt that Spurlock had singled him out and was following him around with the video camera, so Skewarczynski squirted water at Spurlock's video camera. Skewarczynski further testified that he did not intend to hit Spurlock in the eye with water, but had only intended to hit the lens of the video camera, and that if he hit Spurlock in the eye it was an accident. Sometime after this incident Spurlock went to the hospital where he was advised to use eye drops, and he was back on duty a short time later. It appears that Spurlock suffered no injury.[6]

Skewarczynski's conduct under these circumstances is not sufficiently egregious to bar his reinstatement. Skewarczynski had been playfully squirting his own fellow strikers with the water pistol, and he credibly testified that he did not intend to squirt water into Spurlock's eyes but had only attempted to squirt at Spurlock's camera. It is simply unreasonable to conclude that any person who witnessed this occurrence would likely have felt coerced or intimidated by Skewarczynski's wielding of the water pistol. Accordingly,

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[6] The credited testimony is that there was only drinking water in Skewarczynski's water pistol.

we conclude that Skewarczynski's conduct did not provide the Respondent with a lawful basis for discharging him.[7]

Remedy

We modify the judge's recommended Order and notice to grant the discriminatees only the rights of economic strikers under the Board's decision in *Laidlaw Corp.*[8] In *Detroit Newspapers*, 326 NLRB 700 (1998), the Board concluded that the Respondent's employees (and the employees of the News and the Free Press) had struck in response to unfair labor practices committed by the News during bargaining. The Board thus held that all the striking employees were either unfair labor practice strikers or sympathy unfair labor practice strikers, depending upon the identity of their employer. On July 7, 2000 (after the administrative law judge had issued his decision in this case), the United States Court of Appeals for the District of Columbia Circuit granted the Respondents' petition for review and rejected the Board's conclusion that

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[7] We find inapposite the cases our colleague cites concerning striker misconduct (*Teamsters Local 812 (Pepsi-Cola Newburgh)*, 304 NLRB 111 (1991); *District 1199, RWDSU (Southport Manor Convalescent Center)*, 227 NLRB 1732 (1977)). The misconduct involved in those cases, throwing liquids into a driver's face and onto vehicles' windshields as they were attempting to maneuver through the picket line, raises much greater safety concerns and thus was far more coercive.

[8] 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). We also modify the Order to conform with the decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). Further, we substitute a new notice that conforms with the revised Order, and with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

unfair labor practices had caused the strike. *Detroit Typographical Union No. 18 v. NLRB,* 216 F.3d 109 (2000). In light of the court's decision, we accept as the law of the case that the strike was an economic strike. Consequently, we revise the judge's recommended remedy and Order to grant the discriminatees the rights of returning economic strikers (not unfair labor practice strikers).

Under *Laidlaw,* economic strikers who unconditionally apply for reinstatement (whether by themselves or through their Union on their behalf) are to be reinstated to their former jobs. However, if their positions were filled by permanent replacements prior to their offer to return to work, the strikers are entitled to full reinstatement on a nondiscriminatory basis either upon the departure of the permanent replacements or, if those positions no longer exist, to substantially equivalent positions, unless they have in the meantime acquired other regular and substantially equivalent employment or the employer can show that it failed to offer reinstatement for legitimate and substantial business reasons. *Rose Printing Co.,* 304 NLRB 1076 (1991).

In accordance with these principles, we shall order the Respondent to offer to reinstate Floyd Davis Jr., Anthony Edwards, Douglas McPhail, Steven Montagne, Gary Rusnell, Larry Skewarczynski, Harry Thompson, and Mike Youngmeier immediately to their former positions or, if they were permanently replaced prior to the Unions' offer to return to work in February 1997, to afford them the rights of permanently replaced economic strikers under *Laidlaw Corp.,* supra. The strikers shall be made whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges, in the manner prescribed in *F.W. Woolworth Co.,* 90 NLRB 289 (1950), with interest to be

computed in accordance with *New Horizons for the Retarded,* 283 NLRB 1173 (1987).[9]

ORDER

The National Labor Relations Board orders that the Respondent, Detroit Newspaper Agency, d/b/a Detroit Newspapers, Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging its employees' activity on behalf of a labor organization by discharging striking employees without an honest belief that they had engaged in serious misconduct, or where they had not engaged in serious misconduct.

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[9] There is no allegation that the Respondent unlawfully failed to reinstate nondischarged strikers on request in February 1997. Thus, any make-whole relief shall run from the dates of the discharges. Because the unlawfully discharged strikers were economic strikers, the Respondent's backpay liability is contingent on whether the strikers were permanently replaced before the Unions' unconditional offer to return to work. If any of the unlawfully discharged strikers were thus replaced, no backpay would be owed for any period of time that the replacements continued in the Respondent's employ during the backpay period.

In regard to striker Anthony Edwards, Respondent DNA offered to reinstate him on April 23, 1996, but he refused. While Edwards was within his rights to reject this offer and continue his strike, his backpay should be tolled for the period between the offer of reinstatement and the date when the Respondent failed to offer him the *Laidlaw* reinstatement rights extended to the other returning strikers. See *Abilities & Goodwill,* 241 NLRB 27 fn. 5 (1979).

(b) In any like or related manner interfering with, *restraining, or coercing employees in the exercise of the* rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Floyd Davis Jr., Anthony Edwards, Douglas McPhail, Steven Montagne, Gary Rusnell, Larry Skewarczynski, Harry Thompson, and Mike Youngmeier full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, if they were not permanently replaced before their Unions' February 1997 offer to return to work, dismissing if necessary any replacements hired thereafter. If no employment is available for the discriminatees, they shall be placed on a preferential hiring list based on seniority, or some other nondiscriminatory test, for employment as jobs become available.

(b) Make Floyd Davis Jr., Anthony Edwards, Douglas McPhail, Steven Montagne, Gary Rusnell, Larry Skewarczynski, Harry Thompson, and Mike Youngmeier whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve, and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at each of its facilities in the State of Michigan, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 31, 1995.

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[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 30, 2004

/s/_____
Wilma B. Liebman, Member

/s/_____
Dennis P. Walsh, Member

DISSENT

MEMBER SCHAUMBER, dissenting in part.

I agree with my colleagues' disposition of this case in all respects except one: unlike the majority I do not adopt the judge's finding that the discharge of employee Larry Skewarczynski was unlawful. In my view, Skewarczynski was guilty of serious strike misconduct and the Respondent lawfully discharged him for it.

The Respondent was the target of a bitter, 19-month-long strike that involved widespread acts of coercion and intimidation by picketers requiring the repeated intervention of the police and the courts. It is undisputed that, while on the picket line on July 29, 1995, Skewarczynski squirted a liquid into the eyes of security guard Spurlock. Skewarczynski admitted that he had squirted the Respondent's guards on numerous occasions in response to their videotaping his picket line activities, because he believed that the guards were singling him out. Security guard Holden testified that he

witnessed Skewarczynski squirt Spurlock while Holden was videotaping two other guards making a sweep for nails and other objects near the picket line, and that Spurlock complained that the liquid burned his eyes. The judge credited this testimony. It is undisputed that Spurlock immediately left work for medical treatment at a hospital, but the judge found that this evidence, although uncontradicted, did not establish that Spurlock was in fact injured. Indeed, the judge surmised, with absolutely no evidentiary basis, that Spurlock might have falsely accused Skewarczynski of injuring him because he was fed up with being squirted by Skewarczynski 10 to 20 times that day.

I cannot endorse the judge's gratuitous suggestion that Spurlock fabricated the injury report. Even assuming arguendo that Spurlock was not injured by the squirting incident, the undisputed evidence is sufficient to show that Skewarczynski engaged in serious strike misconduct for which he could lawfully be discharged.

It is undisputed that Skewarczynski repeatedly squirted the Respondent's security guards, including Spurlock. The coercive impact of this conduct is demonstrated by the fact that its purpose was to deter the security guards from filming him. Being squirted in the eye with an unknown substance by an individual who has made common cause with those who perpetrated the acts of coercion and intimidation committed during this strike would frighten a reasonable person, even if the liquid used turned out to be water. Employees witnessing this abuse would reasonably assume that its target had, in fact, been injured where, as here, the target complained that his eyes were burning and immediately left to seek medical treatment. Even if it is true that Spurlock was not injured, that development would not lessen the coercive impact of this abuse because employees would have no knowledge of it. In

these circumstances, Skewarczynski's actions had a reasonable tendency to coerce employees in the exercise of their Section 7 rights, and therefore justified his discharge under *Clear Pine Mouldings,* 268 NLRB 1044, 1046 (1984), enfd. 765 F.2d 148 (9th Cir. 1985). See *Teamsters Local 812 (Pepsi-Cola Newburgh),* 304 NLRB 111, 117 (1991) (striker who threw liquid from a cup at a truckdriver's face guilty of strike misconduct); *District 1199 RWDSU, AFL-CIO (Southport Manor Convalescent Center),* 227 NLRB 1732, 1734-1735 (1977) (picketer who threw liquids onto vehicle windshields guilty of strike misconduct).

Dated, Washington, D.C. June 30, 2004

/s/_____
Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discourage our employees' activity on behalf of a labor organization by discharging striking employees, without an honest belief that they had engaged in serious misconduct, or where they had not engaged in serious misconduct.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Floyd Davis, Jr., Anthony Edwards, Douglas

McPhail, Steven Montagne, Gary Rusnell, Larry Skewarczynski, Harry Thompson, and Mike Youngmeier, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, if they were not permanently replaced before the Unions' February 1997 offer to return to work, dismissing if necessary any replacements hired thereafter. If no employment is available for the discriminatees WE WILL place them on a preferential hiring list based on seniority, or some other nondiscriminatory test, for employment as jobs become available.

WE WILL make Floyd Davis Jr., Anthony Edwards, Douglas McPhail, Steven Montagne, Gary Rusnell, Larry Skewarczynski, Harry Thompson, and Mike Youngmeier whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Floyd Davis, Jr., Anthony Edwards, Douglas McPhail, Steven Montagne, Gary Rusnell, Larry Skewarczynski, Harry Thompson, and Mike Youngmeier, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

DETROIT NEWSPAPER AGENCY
D/B/A DETROIT NEWSPAPERS

APPENDIX D

NATIONAL LABOR RELATIONS BOARD

[Filed December 17, 1999]

Cases 7-CA-38079, 7-CA-38260, 7-CA-38320, 7-CA-38321, 7-CA-38322, 7-CA-38347, 7-CA-38393, 7-CA-38457, 7-CA-39008, 7-CA-39119, 7-CA-39401, 7-CA-39523, 7-CA-38081, 7-CA-38118, 7-CA-39596, 7-CA-38313, 7-CA-38812, 7-CA-39105, 7-CA-39435, 7-CA-39436, 7-CA-39550, 7-CA-39570, 7-CA-39574, 7-CA-39593, 7-CA-39594, 7-CA-39850, 7-CA-40008, 7-CA-38367, 7-CA-38487, 7-CA-38545, 7-CA-38552, 7-CA-38706, 7-CA-39396, 7-CA-39548, 7-CA-39597, 7-CA-39813, 7-CA-39966, 7-CA-40086, 7-CA-40226, 7-CA-38509, 7-CA-39894, 7-CA-39549, 7-CA-39610, 7-CA-39901, 7-CA-38216, 7-CA-38338, 7-CA-39118, 7-CA-39377, 7-CA-39525, 7-CA-39895, 7-CA-40024, 7-CA-40118, 7-CA-40283, 7-CA-39526

Detroit Newspaper Agency, d/b/a Detroit	)
Newspapers and Local Union 13N, Graphic	)
Communications International Union, AFL-CIO	)
and Detroit Mailers Union No. 2040,	)
International Brotherhood of Teamsters, AFL-CIO;	)
Local No. 372, International Brotherhood of	)
Teamsters, AFL-CIO and Detroit Mailers Union	)
No. 2040, International Brotherhood of Teamsters,	)
AFL-CIO and Local No. 372, International	)
Brotherhood of Teamsters, AFL-CIO and	)

Newspaper Guild of Detriot Local 22,)
the Newspaper Guild and Detroit Typographical)
Union No. 18, Communications Workers of America)
and The Detroit News, Inc., and Newspaper Guild of)
Detroit, Local 22, The Newspaper Guild, and)
The Detroit Free Press and Newspaper Guild of)
Detroit, Local 22, The Newspaper Guild)
)

DECISION

Statement of the Case

RICHARD A. SCULLY, Administrative Law Judge. Upon charges filed by Local 13N, Graphic Communications International Union, AFL-CIO (GCIU Local 13N), Detroit Mailers Union No. 2040, International Brotherhood of Teamsters, AFL-CIO (Teamsters Local 2040), Local 372, International Brotherhood of Teamsters, AFL-CIO (Teamsters Local 372), Newspaper Guild of Detroit, Local 22, The Newspaper Guild, AFL-CIO (Guild Local 22) and Detroit Typographical Union No. 18, Communications Workers of America, AFL-CIO (DTU No. 18), the Regional Director, Region 7, National Labor Relations Board (the Board) issued a number of complaints alleging that the Respondents, Detroit Newspaper Agency, d/b/a Detroit Newspapers (the DNA), The Detroit News (The News), and The Detroit Free Press (The Free Press), had committed violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discharging or disciplining a number of employees who had participated in a strike against the Respondents. Several of the complaints, involving 121 disciplinary actions, were

consolidated for hearing in this proceeding.[1] Each of the Respondents has filed a timely answer denying that it has committed any violations of the Act.

A hearing on these consolidated complaints was held in Detroit, Michigan, on 53 dates between September 22, 1997, and September 23, 1998, at which all parties were given a full opportunity to examine and cross-examine witness and to present other evidence and argument. Briefs submitted on behalf of the parties have been given due consideration. Upon the entire record, and from my observation of the demeanor of the witnesses, I make the following

Findings of Fact

I. The Business of the Respondents

At all times material, the DNA was organized as a Joint Operating Agreement (JOA) partnership pursuant to the Federal Newspaper Preservation Act and under Michigan law. Respondents, The News, a subsidiary of Gannett Newspapers, Inc., and The Free Press, a subsidiary of Knight-Ridder Newspaper, Inc., have been co-partners doing business for the purposes set forth in the following paragraph under the trade name and style of Detroit Newspapers, formerly known as Detroit Newspaper Agency.

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[1] The complaint allegations concerning 11 disciplinary actions taken by the DNA against Lawrence Ammon, Sam Attard, Pat Coffey, Harry Collins (2), John Edgeworth, Jimmy Gardner, Judith McCoy, Armand Nevers (2), and Franklin Weston have been withdrawn.

At all times material, the DNA has maintained an office and place of business at 615 West Lafayette, Detroit, Michigan, and has engaged in the publishing and circulation operations of all non-news and non-editorial departments of The News and The Free Press as a unified business enterprise as agent for and for the benefit of both newspapers and is responsible for selling advertising, printing, and distributing the two newspapers.

During each of the calendar years 1995 and 1996, the DNA in the course and conduct of its business operations derived gross revenues in excess of $500,000 and purchased and received at its facilities in the State of Michigan newsprint and other goods and materials valued in excess of $50,000 directly from points outside the State of Michigan.

At all times material, The News has been a Michigan corporation with an office and place of business at 615 West Lafayette, Detroit, Michigan, and has been engaged in the operation of the news and editorial departments of a daily newspaper. During each of the calendar years 1995 and 1996, The News in the course and conduct of its business operations derived gross revenues in excess of $200,000, held membership in and/or subscribed to various interstate news services, published various nationally syndicated features, and advertised various nationally sold products.

At all times material, The Free Press has been a Michigan corporation with an office and place of business at 321 West Lafayette, Detroit, Michigan, and has been engaged in the operation of the news and editorial departments of a daily newspaper. During each of the calendar years 1995 and 1996, The Free Press in the course and conduct of its business operations derived gross revenues in excess of $200,000, held membership in and/or subscribed to various interstate news

services, published various nationally syndicated features, and advertised various nationally sold products.

The Respondents admit, and I find, that at all times material each has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Labor Organizations Involved

The Respondents admit, and I find, that at all times material each of the Charging Unions has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Background

Since the JOA went into effect in 1989, the DNA has carried out the non-editorial functions of The News and The Free Press, including, the printing, distribution, sale of advertising for, and promotion of the two newspapers. The News and The Free Press operate separate and independent editorial and news departments.

The DNA and The News have their offices in The News building on West Lafayette Boulevard. At the time of these events, The Free Press offices were in a building a few blocks away on West Lafayette. The DNA has two production facilities, the Riverfront plant on West Jefferson in Detroit and the North Plant in Sterling Heights, Michigan. It also has a number of distribution centers located throughout the Detroit and suburban areas where newspapers are picked up by single copy drivers for delivery to retailers and newspaper racks and by carriers for home delivery. Both The News and The Free Press have news bureaus in suburban areas where

reporters and other staff members work but which are generally not used to transact business with the public.

At the DNA, Teamsters Local 372 represents circulation department employees; Teamsters Local 2040 represents mailers; GCIU Local 13N represents pressroom employees; platemakers, and paperhandlers; GCIU Local 289 represents photoengravers; DTU No. 18 represents composing room employees; and Guild Local 22 represents janitors. The editorial employees of both The News and The Free Press are represented by Guild Local 22. The collective-bargaining agreements between the Respondents and the six above-mentioned Unions expired on April 30, 1995.[2] On July 13, 1995, the six Unions struck the Respondents and over 2000 employees went out on strike. The strike lasted until February 1997, when the striking Unions made unconditional offers to return to work. In prior decisions in unfair labor practices cases arising from the strike, the Board has held that the strike was caused by the Respondents' unfair labor practices[3] and that they have violated Section 8(a)(3) and (1) by failing to reinstate unfair labor practices strikers who have made unconditional offers to return to work.[4] An issue not reached in *Detroit Newspapers II*, to be decided here, is whether the Respondent lawfully discharged certain of those strikers

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[2] There are other DNA employees who are represented by unions that had reached new agreements prior to that date. They are not involved in this proceeding.

[3] *Detroit Newspapers I*, 326 NLRB No. 64 (Aug. 27, 1998).

[4] *Detroit Newspapers II*, 326 NLRB No. 65 (Aug. 27, 1998).

because they had engaged in serious misconduct during the strike.[5]

B. Applicable Legal Principles

In cases involving the discharge of striking employees for engaging in strike misconduct, the burden of going forward shifts, but the General Counsel has the overall burden of proving discrimination. *NLRB v. Bumup & Sims*, 379 U.S. 21, 23 (1964); *Gem Urethane*, 284 NLRB 1349, 1352 (1987). Initially, the General Counsel must establish that the employee was a striker and that the employer took action against him for conduct associated with the strike. At that point, the burden shifts to the employer to establish that it had an honest belief that the employee engaged in the conduct for which he was discharged. If it does so, then the General Counsel must affirmatively establish that the employee did not engage in such misconduct or that the misconduct was not sufficiently egregious to warrant discharge. *Gem Urethane*, supra at 1352 (1987); *Laredo Coca Cola Bottling Co.*, 258 NLRB 491, 496 (1981); *Rubin Bros.*, 90 NLRB 610, 611 (1952).

The employer's burden of establishing its "honest belief" is no more than that and does not require it to prove that the striker did in fact engage in misconduct. *Axelson, Inc.*, 285 NLRB 862, 864 (1987); *Gem Urethane*, supra at 1352. It does, however, require more than the mere assertion that it had such a belief. There must be some specificity, linking particular employees to particular allegations of misconduct.

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[5] The consolidated complaint also alleges that, in two cases, disciplinary actions less than discharge for alleged strike-related misconduct were unlawful.

Beaird Industries, 311 NLRB 768, 769 (1993); *General Telephone Co.*, 251 NLRB 737, 739 (1980). The employer's "honest belief" may be based on hearsay sources, such as, the reports of nonstriking employees, supervisors, security guards, investigators, police, etc. *Clougherty Packing Co.*, 292 NLRB 1139, 1142 (1989); *Newport News Shipbuilding*, 265 NLRB 716, 718 (1982); *General Telephone Co.*, supra at 739.[6] Whether or not the employer had an "honest belief" is judged on the basis of the evidence available to it when it took the disciplinary action and it need not attempt to get the striker's side of the story before doing so. *Giddings & Lewis*, 240 NLRB 441, 448 (1979); *Associated Grocers of New England*, 227 NLRB 1200, 1207 (1977).

Not all misconduct is sufficient to disqualify a striker from further employment. *Medite of New Mexico*, 314 NLRB 1145, 1146 (1994). In *Clear Pine Mouldings*,[7] the Board held that strike misconduct is disqualifying if, under all of the surrounding circumstances, it may reasonably tend to coerce or intimidate other employees in the exercise of rights protected under the Act. The *Clear Pine Mouldings* standard is an objective one and does not involve an inquiry into whether any particular employee was actually coerced or intimidated. *Mohawk Liqueur Co.*, 300 NLRB 1075 (1990). This standard also applies to misconduct directed at non-employees such as supervisors, security guards, and

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[6] While numerous such hearsay documents were admitted into evidence at the hearing to establish a respondent's "good-faith belief" that strikers had committed acts of misconduct, it was made clear that this was the only purpose for which each document would be considered unless another basis for admission to evidence was established.

[7] 268 NLRB 1044 (1984).

independent contractors. *General Chemical Corp.*, 290 NLRB 76, 82 (1988); *PBA, Inc.*, 270 NLRB 998 (1984).

An employer may not knowingly tolerate behavior by nonstrikers or replacement employees that is at least as serious, or more so, than the conduct it is relying on to discharge a striker. *Chesapeake Plywood*, 294 NLRB 201, 204 (1989); *Champ Corp.*, 291 NLRB 803, 806 (1988); *Aztec Bus Lines*, 298 NLRB 1021, 1027 (1988). Consequently, even in a case where a striker has engaged in serious misconduct, he may still be entitled to reinstatement if the General Counsel establishes that the employer has applied a double standard in dealing with strike misconduct and that the disciplinary action taken against the striker amounts to disparate treatment.

C. The Respondents' Disciplinary Procedures

After the strike began and the Respondents received complaints of striker misconduct, they set up procedures for reporting, investigating, and taking disciplinary action on strike-related complaints. These procedures related only to allegations of striker misconduct and did not displace the prestrike disciplinary systems that applied to working employees and were generally handled by departmental supervisors.[8] The separate strike-related disciplinary process was coordinated by John Taylor, the DNA's Director of Labor Relations and Senior Legal Counsel. Once an allegation of strike-related misconduct was received, it was usually investigated by DNA security personnel or by independent

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[8] One early incident of alleged misconduct involving striker Anthony Edwards, which occurred the day after the strike started, was handled by a departmental supervisor.

investigators specifically retained for that purpose.[9] In cases where the investigation identified an alleged perpetrator of misconduct, all of the information was forwarded to Taylor. If Taylor decided that no disciplinary action was warranted no further action was taken. If he determined that disciplinary action should be taken, he forwarded all of the information to the appropriate decision maker along with his recommendation. For the DNA, the final decision on disciplining its employees for strike-related misconduct was made by Timothy Kelleher, Senior Vice President, Labor Relations. In the case of The News, the decisions were made by Editor and Publisher Robert H. Giles, until his retirement in July 1997, and thereafter by his successor in that position, Mark Silverman. Publisher Heath J. Meriwether made those decisions for The Free Press.

I find no evidence that the separate disciplinary process set up by the Respondents to handle complaints involving strike-related misconduct was discriminatory, in and of itself.[10] Under the circumstances, it was a reasonable way of handling a large number of complaints which differed significantly from the kind of everyday disciplinary problems with which departmental supervisors normally dealt. Often, complaints against striking employees involved incidents that were far removed from their normal workplaces and presented issues

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[9] A strike incident form was developed and forms were available at the Respondents' facilities for nonstriking employees, security guards, independent contractors, etc., to report incidents of misconduct, however, this form was not mandatory and was not always used. In some cases, investigations resulted from Taylor's own observation of an incident.

[10] Whether or not specific decisions constituted discriminatory disparate treatment are considered below.

which required legal and/or labor relations expertise. In all likelihood, a departmental supervisor, who issues discipline based on absenteeism, lack of productivity, or other workplace matters, may well lack the experience and/or competence to judge incidents of strike misconduct which, under *Clear Pine Mouldings*, turn on whether or not they coerce or intimidate other employees exercising protected rights. The Respondents' system encouraged uniformity in how incidents were investigated, the appropriate standard was applied, and the disciplinary actions that were taken. I also find that the fact that in some cases there was a considerable delay before disciplinary action was taken does not constitute evidence of a discriminatory motive. The large volume of reported incidents that had to be investigated obviously caused some delays. In some incidents involving large numbers of strikers, information that had been initially been unavailable or overlooked was subsequently used to achieve uniformity in the way discipline was administered. As noted above, the Respondents was not required to seek out and get a striker's side of the story before taking disciplinary action. I find the fact that it did give non-striking employees who were charged with misconduct such opportunities does not under these circumstances establish disparate treatment. In most cases, the nonstrikers were interviewed while at work immediately after the incidents occurred. The legal and logistical problems involved with contacting, meeting with, and interviewing striking employees made it impractical to do so. In any event, there was no credible evidence that Taylor or Kelleher ever refused the opportunity to be heard to any striker who requested it.

I also find no evidence to support counsel for the General Counsel's contention that Kelleher's testimony establishes that he was biased or that he and Taylor looked only for grounds to establish an "honest belief" while failing to make "an

honest evaluation" of each incident of alleged misconduct. On the contrary, in the majority of the incidents involved here, I have found that Kelleher's testimony established that he had an honest belief that the accused strikers had engaged in serious misconduct. This argument would have more appeal if there were evidence that any discharged striker or his Union had approached Kelleher to dispute the decisions he had made and he had turned a deaf ear. What little evidence there is shows that, when a striker who had been discharged directly challenged Kelleher's decision, a further inquiry was made and, in at least four cases, the discharges were rescinded. He may well have made his decisions "with an eye towards litigation," as they contend, but since the Charging Unions chose to test his decisions only by filing charges with the Board and each decision inevitably had to pass the Board's *Clear Pine Mouldings* test, he would have been remiss not to have done so.

D. The Orders of the Board and the Sixth Circuit

During the course of the strike, on July 24, 1996, pursuant to a settlement agreement with the striking Unions, the Board issued a broad order requiring the Unions to cease and desist from, inter alia, in any manner coercing the Respondents replacement workers and other employees, interfering with ingress and egress at their facilities, and threatening or engaging in acts of violence or vandalism against individuals, their property, or that of the Respondents. The Board's Order was enforced by an Order of the U.S. Court of Appeals for the Sixth Circuit on August 16, 1996.

In many instances during the hearing, the Respondents indicated that disciplinary action was taken against strikers, at least in part, because they had violated these Orders. Although the Respondents have attempted to bolster their

positions by asserting that strikers' actions were somehow more deserving of punishment because they violated the settlement agreement and the Orders enforcing it, the fact is that the only issues involved here are whether the actions of the discharged employees were outside the protection of the Act. The Orders do not purport to limit the rights of the striking employees, protected by Section 7 of the Act, nor to expand the protected rights of nonstriking employees. They are not self-help mechanisms which conferred upon the Respondents the right to determine who had violated them. What they provide is a procedure whereby violations of those rights can be dealt with by the Board and the Sixth Circuit. However, there was no evidence that any discharged striker had ever been adjudicated by either the Board or the court of appeals as having violated these Orders or that any applications had ever been made to do so. As the Sixth Circuit has pointed out: "It is not the fact that there was a violation of the injunction that determines whether they [strikers] should or should not be reinstated, but the type of conduct they engaged in, and the manner and nature and seriousness of their violation of the order." *NLRB v. Cambria Clay Products*, 215 F.2d 48, 54 (6th Cir. 1954). Those determinations have yet to be made by any adjudicative body.

E. Alleged Misconduct by Strikers

1. Discharge of Richard Andrews

Richard Andrews has been employed by the DNA since the JOA as a pressman. He previously worked for The Free Press, beginning in 1983. He is a member of GCIU Local 13N. He went on strike on July 13, 1995, and has not returned to work. By letter, dated November 1, 1995, he was informed that he was being discharged. The letter states that, on September 27, 1995, he had intentionally obstructed the

view of a truckdriver at the Flint Distribution Center, jeopardizing the health and safety of the driver and that this, together with his prior strike-related misconduct, constituted just cause for discharge.[11]

Kelleher testified that he made the decision to discharge Andrews after reviewing a packet of information provided by Taylor. The only document that was identified was an LSS Investigative Sheet, which has Andrews' name on it, refers to videotape # 0281, and has a note stating: "Blocking view of driver attempting to back up semi-truck." He said that he had previously made the decision to issue a warning to Andrews for trespassing at the Brighton Distribution Center after reviewing videotape of that incident. However, he was unable to say whether he had viewed the videotape of the September 27, 1995 incident before he made his decision to discharge Andrews. He testified that he had "a good faith belief that Mr. Andrews was involved in the blocking of view of a driver attempting to back up a semi-truck . . . at the Flint Distribution Center."

The record contains a videotape of the September 27 incident for which Andrews was discharged. The video shows a semi attempting to back up for about 2 minutes while picketers are standing nearby, apparently, in a public right-of-way. One picketer, wearing a black shirt and hat, is shown at times holding a picket sign near the right rearview mirror of

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[11] There is evidence that Andrews had previously received a written warning for trespassing on DNA property at the Brighton Distribution Center on August 18, 1995. In their brief, counsel for the General Counsel appear to be asking for a ruling that this warning was unlawful. It was not mentioned in the consolidated complaint and, during the hearing, counsel stipulated that the legality of that warning was not an issue in this matter.

the truck's cab. Andrews, who is identified as wearing a blue shirt, is shown standing near the passenger side of the cab of the truck and is holding a picket sign. At one point, while he was standing forward of the truck's rearview mirror, he pointed his sign towards the truck. The sign never came between the mirror and the window of the cab and most of the time it was pointed towards and was only a few inches above the ground.

Andrews credibly testified that he never touched the truck with his picket sign and that he did not obstruct the view of the driver.

Analysis and Conclusions

Andrews was discharged for allegedly obstructing a truckdriver's view as he was attempting to back up his truck into the Flint Distribution Center on September 27, 1995. I find that the Respondent has failed to establish that, at the time of Andrews' discharge, it had a good-faith belief that he had done so. Kelleher's testimony fails to establish that he had viewed the videotape before he made his decision to terminate Andrews. The one document he did identify as having reviewed before making his decision, the LSS Investigative Report, contains no information from which such a conclusion could reasonably have been reached. Even if he had viewed the videotape before making his decision, it cannot support a good-faith belief that Andrews had engaged in the misconduct for which he was discharged. Nowhere in the tape does it show Andrews doing anything that could be construed as interfering with the driver's view.[12] At the hearing, the

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[12] A stronger argument might be made with respect to the man in the black shirt and hat, as he at times is shown holding his sign

Respondent presented the testimony of James Payne, an APT security guard, who took the video of this incident. Payne testified that, before he started taping the incident involving the truck, he observed three or four union supporters surround it, hit the truck and its window with their picket signs, and hold their signs in front of the windshield blocking the driver's view. He testified that Andrews was the "instigator" and "was one of the main individuals blocking the truck, hitting the truck with his sign and the windshield." Payne said that he had made a written incident report about this incident but that he had never talked to Kelleher or Taylor about it. Since there is no evidence that Kelleher had spoken to Payne or reviewed his written report, his version of the incident could not have been relied on by Kelleher when he made his decision to discharge Andrews.

Apart from the question of the Respondent's good-faith belief, considering all of the evidence, I find that it fails to establish that Andrews had engaged in serious misconduct on September 27, 1995. The truckdriver did not testify at the hearing and there is no way to tell from the videotape alone whether the driver's view was in fact obstructed. But even assuming, arguendo, that the driver's difficulty in backing up his truck (the only reason given by the Respondent in the discharge letter and in a position statement submitted to the Board, dated May 24, 1996) was attributable to an obstruction to his view, the videotape clearly shows that Andrews was not responsible for it. I do not credit Payne's testimony about

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near the rearview mirror. However, even that is inconclusive absent testimony from the driver. Kelleher testified that he did not know Andrews personally and that he was identified to him by others. It may well be that he believed that the man in the black shirt and hat was Andrews.

Andrews and other picketers allegedly hitting the truck and blocking its windshield with picket signs before he started videotaping. The written report he claimed to have made about this incident was not produced or accounted for. I infer that it would not have supported Payne's version of the incident. Moreover, the failure to produce the driver, the one person directly affected by the alleged misconduct and in the best position to know how or if his view was obstructed, leads me to conclude that neither Andrews nor any other picketer struck the truck or blocked its windshield with a picket sign, as Payne claimed.[13] As noted above, I credit Andrews' testimony that he did not do so.[14]

In its brief, the Respondent contends that Andrews was subject to discharge because, taken together, his misconduct on August 18 and the incident on September 27, 1995, constituted serious misconduct. Since the evidence fails to establish that Andrews did anything on September 27, 1995 that constituted misconduct, his discharge based to any extent

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[13] It also undermines the Respondent's claim that Andrews should be held vicariously liable for the misconduct of others who were present that night.

[14] The Respondent's attack on Andrews' credibility is not persuasive. It asserts that he changed his story by first saying he did not approach the truck but that it drove towards him and later saying that he walked close to the truck. The first part of his testimony related to what was shown in the videotape while the second was in response to Payne's testimony about what he saw before he started videotaping. Moreover, the question of whether he walked towards the truck or the truck came towards him is insignificant and casts no doubt on his credibility or his consistent testimony, on both occasions, that he did not use his sign to touch the truck or to obstruct the driver's view.

on that incident was unlawful and violated Section 8(a)(3) and (1).

2. Discharge of Derrick Bell

Derrick Bell has been employed by the DNA in the maintenance department since the JOA, primarily at the Riverfront plant. He previously worked for The Free Press, beginning in 1985. He is a member of Guild Local 22. He went on strike on July 13, 1995, and has not returned to work. He testified that during the strike he did picket duty at the Riverfront plant. By letter, dated November 16, 1995, he was informed that he was being discharged for striking a DNA security officer with the stick portion of a picket sign at the Riverfront plant on September 16, 1995.

Kelleher testified that he made the decision to discharge Bell after reviewing certain documents, photographs, and a videotape. These were (1) a copy of Bell's photo identification card; (2) an unsworn affidavit of security guard Greg Felty, dated September 25, 1995, stating that on September 16, 1995, at the gate to the Riverfront plant, he observed Bell strike a security guard in the abdominal area with his picket stick and photographed him doing so; (3) a sworn affidavit of Felty, dated October 19, 1995, describing the same incident; (4) an unsworn affidavit of security guard Tony Pack, dated September 25, 1995, stating that as he was helping close the gate at the Riverfront plant, a picketer identified to him as Bell pushed against it causing him to step back, Bell then struck him with a picket stick on his left side, in the area of his stomach, attempted to strike him again but was prevented from doing so by a police officer, and that he reviewed photographs of the incident which accurately depict what occurred and show the picketer who struck him; (5) an

unsworn affidavit of Pack, dated October 19, 1995,[15] describing the same incident; (6) and (7) photographs of Bell at the Riverfront plant gate on September 16, 1995; and (8) a videotape of the incident. Based on the information provided by these materials, Kelleher concluded that Bell had struck security guard Pack with his picket stick and that he should be terminated.

Greg Felty testified that he has been employed by APT since 1993. He came to Detroit in June 1995 and was assigned to the Riverfront plant as a photographer. He said that he observed an incident on September 16, 1995, in which Bell struck Pack in the abdomen with his picket stick while Pack was attempting to close the gate to the plant. He saw Pack let go of the gate, throw his hands up in the air, and grab his side. He saw a police officer immediately take the picket stick away from Bell. When he observed this, he was standing on a roof, three to four stories high, about 25 yards to the west of the gate. He said that he took the photographs of Bell that are in the record immediately after Pack was struck.

Bell testified that he did not strike the security guard with his picket stick. He was shown the videotape of the incident and admitted that he is shown putting the stick portion of his sign through the opening of the gate. He said that he did so in order to point at a security guard to whom he was talking but he denied that the stick hit anyone. Bell testified that he was

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[15] Although this purports to be a sworn affidavit, the fact that it was signed by Pack on October 19, 1995, indicates that it was neither signed nor sworn to on October 20, 1995, before Kelly L. Ingles, the Notary Public whose name it bears and who attested that it was signed and sworn to in her presence on that date.

not arrested or cited for any violation in connection with this incident. He denied that, at the time of the incident, the security guard said that he had been hit by Bell's stick.

Analysis and Conclusions

I find that the Respondent had a good-faith belief that Bell had struck a security guard with a picket stick based on the written statements of Pack, the guard who said he was struck, and the videotape of the incident, which is not conclusively inconsistent with his statements. Striking a guard constitutes serious misconduct under *Clear Pine Mouldings*. There is nothing in the materials Kelleher reviewed that would indicate that Pack was not telling the truth about being struck.

Pack was not called to testify at the hearing. The videotape shows that, in addition to Pack, there is another security guard, standing within a foot or two of Pack when he is alleged to have been struck and another guard is behind them using a camera. Neither of these security guards was called as a witness. Instead, the Respondent chose to rely on the videotape, some still pictures taken after the incident with the picket stick had ended, and the testimony of Felty, a security guard who observed the incident from a roof, at least 25 yards away and three or four stories above the scene. The videotape fails to establish that Pack or anyone else was struck by Bell's picket stick. However, it does clearly contradict Felty's testimony that he saw Pack throw up his hands and grab his side when the stick came through the fence. That simply did not happen. What it does show is that Pack's reaction was to reach forward, grab the stick, and hold it momentarily until a police officer pulled it away from him. Given the distance he was from the scene and the fact that his account is at odds with the videotape, I find that Felty's testimony cannot be credited. There has been no explanation

for the failure of Pack or the other security guards that were standing nearby to appear as witnesses. This raises the inference, which I draw, that their testimony would not have supported the Respondent's position that Pack was struck by the picket stick.[16]

Several things convince me that Pack was not actually struck by Bell's picket stick. The first is the videotape which shows the stick move in one uninterrupted motion. It does not show it striking Pack or deviating from the line on which it is moving, as would be expected if it touched or glanced off something. Not only does the videotape not show Pack being struck; close examination shows that the picket stick does not come through the gate far enough to reach where he is standing. Next, is the complete lack of reaction on the part of Pack after he was allegedly struck. If the stick had hit him, one would expect he would give some physical indication of that fact. In the videotape, he reaches forward and grabs the picket stick for a few moments, then, goes on with closing the gate. Even though Bell continues to picket by the gate, there is no evident interaction between him and Pack. There were several police officers within a few feet of Bell and Pack, one of whom helps Bell pull the picket stick from Pack's grasp. A few moments later, in the video and in the still photos, Bell is seen carrying his picket sign. I find that the failure of the police officers to take any action against Bell indicates not only that they saw nothing but, more important, that Pack

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[16] It is one thing to give an unsworn statement about an incident to one's employer or principal, but something quite different to come forward and testify about that incident under oath in a formal NLRB hearing. In the absence of any explanation as to why Bell's primary accuser did not testify and after viewing the videotape, I conclude that Pack's statements about being struck by Bell were false.

made no complaint to them. Finally, the failure of Pack and the other guards to testify indicates to me that Pack was not struck by the stick.

I credit Bell's testimony that he did not strike Pack and that Pack did not accuse him of doing so during the incident. Although that testimony is self-serving, I believed it, based on his demeanor and because I find that it is not inconsistent with the videotape or the actions of Pack and the police officers who were nearby, as discussed above.[17] I find that the evidence as a whole demonstrates that Bell did nothing during the entire incident that could be considered to be so threatening or intimidating as to constitute serious misconduct. See *Medite of New Mexico, Inc.*, supra at 1146-1147. Accordingly, I find that his discharge violated Section 8(a)(3) and (1) of the Act.

3. Discharge of Rebecca Cook

Rebecca Cook has been employed by The News as a photographer since December 1989. She is a member of the Guild. She went on strike on July 13, 1995, and has not returned to work. She testified that during the strike she did picket duty around The News building and parking garage. By letter, dated July 31, 1996, she was informed that she was

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[17] The Respondent contends that Bell should be discredited because, in an affidavit he gave the Board, he said he did not carry a picket sign on Saturdays and this incident occurred on a Saturday. I find this casts no significant doubt on his veracity. He testified that at the time he gave the affidavit, there was nothing about the date of this incident that stood out in his mind in any way, that he did not normally carry a sign on Saturdays because of the large numbers of people present, and that he was not shown the videotape but copies of photos that did not clearly show him with a sign.

being discharged for assaulting a DNA security officer on January 8, 1996.

Giles testified that he made the decision to discharge Cook after reviewing certain documents and a videotape of the incident. The documents were (1) a DNA-APT Incident Report by Milton Crosson, dated January 8, 1996, which states that he was kicked and verbally assaulted by striker Rebecca Cook at the employee entrance on Third Street; (2) a statement of security guard Eric Johnson to DNA investigator Jim Harrington on April 22, 1996, that on January 18 (sic), 1996, he saw Cook kick Crosson in the shin, shove him with both hands, and threaten to kick his "ass" and that he saw Crosson do nothing to Cook to precipitate her assault; (3) a statement of Security Supervisor Buddy Claxton, given to Harrington on April 19, 1996, that on January 8, 1996, he saw Cook kick Crosson in the left shin, shove him with both hands and threaten to kick his "ass;" (4) a statement of security guard Milton Crosson, given to Harrington on July 17, 1996, that as he and other guards cleared a path for employees to exit the executive garage of The News building he was kicked in the right shin by Cook, that as he turned to face her, Cook shoved him in the chest, and that she threatened to kick his "ass;" and (5) a copy of the photo identification card of Rebecca Cook. Based on the information in these materials, Giles concluded that Cook had assaulted Crosson by kicking him while he was on duty at the garage entrance and that she should be discharged.

Rebecca Cook testified that, on January 8, 1996, she was among a number of picketers near the door to the garage on Third Street. As she was standing with her back to the door, she was punched three times in the back. She turned around and saw Crosson about 2 feet away from her. She put her hands in front of her face and shouted at him, "Don't you

ever hit me again. Don't you ever touch me again." She pulled off the hood she was wearing, shoved him with her hands, and kicked him once in the shin. Two other security guards backed Crosson into the building. She testified that she had seen Crosson before while picketing and that he referred to women picketers as "hos" and "sluts." She said that on several occasions while he was in the garage when she looked towards him Crosson would grab his crotch.

Milton Crosson testified that on the evening of January 8, 1996, he was on duty as a security guard at the entrance to the executive garage that is used by employees to enter and leave The News building. The procedure was for two guards to stand on either side of the door to make a path so the employees could exit. As he and another guard were standing facing the picketers with their backs to one another, Cook, whom he identified at the hearing from a photo, came through the crowd and kicked him in the shin and shoved him. He was not injured. She took off the hood she was wearing and said, "Come on motherfucker, I'll kick your ass." He then backed into the building. He said that he did not touch Cook at anytime that evening and that he did not punch her in the back or do anything to provoke her. He said that he filed a complaint against Cook and testified against her at her criminal trial. He said that he had seen Cook picketing many times before and that she had said things to him but that he had never spoken to her.

Eric Johnson testified that, on January 8, 1996, he was employed as an APT security guard working at the entrance to the executive garage, protecting employees who were entering and exiting. He and Crosson came about four or five steps out of the doorway to clear a path. He was on the left holding the door and Crosson was on the right side of the doorway. Cook, whose back was to Crosson, turned towards

him and kicked him in the shin. As Crosson was backing up, she pushed him and said she was going to kick his ass. He did not see Crosson strike Cook, but he was not watching either of them at all times and did not see what caused her to turn around and kick Crosson.

Analysis and Conclusions

I find that the Respondent has established that it had a good-faith belief that Cook had kicked Crosson. The consistent statements of the security guards which Giles reviewed indicate that Cook kicked and shoved Crosson without provocation.

There is no dispute but that Cook did shove and kick Crosson during this incident. She admits doing so, but contends that she did so in response to being struck in the back by Crosson. Crosson says he did nothing to provoke her. While the self-serving nature of Cook's testimony is obvious, so is that of Crosson who, at the time he testified, was still in the employ of APT and working at one of the Respondents' facilities in Detroit. He acknowledged that striking a picketer under these circumstances would be unacceptable to his employer. Having observed her demeanor while testifying and considering all of the evidence, including the videotape of the incident, I credit the testimony of Cook that she was, in fact, reacting to her perception that she had been struck in the back.

The evidence is clear that, prior to this incident, Cook and Crosson had seen each other many times while Cook was picketing, including, earlier that same evening, yet there had never been any physical contact between them. There is no reason to believe that Cook would suddenly turn around and kick and shove Crosson, while shouting, "don't you ever hit

me again," if she did not think Crosson had struck her. The videotape is not conclusive. Crosson is shown in close proximity behind Cook just before she wheels around to face him. While his left arm is not visible, it is possible that he used it to strike Cook although probably not three times as she claims. It is just as possible that Crosson unknowingly bumped or jostled Cook by accident. Given the number of people present who might have seen it, it seems unlikely that he would have intentionally struck Cook.

Parts of Cook's version of the incident are corroborated by others who were picketing with her that evening. Greg Bowens testified that he was standing about three feet from Cook when security guards came out the door escorting employees. Out of the corner of his eye, he saw movement by Crosson's upper torso and saw Cook move forward as if she had been pushed. She immediately began screaming and accusing Crosson of hitting her. He said that Crosson "started saying stuff back to her" and was restrained and pulled back into the building by two other guards. Robert Ourlian testified that he was on the picket line that evening and heard Cook yell. When he turned towards her, she was a foot or so from Crosson shouting at him, saying things like, "get away from me, don't ever hit me again." Crosson looked like he was ready to fight and other guards got him to go back inside the garage. He asked Cook what had happened and she said that this guard had punched her in the back. Allan Lengel testified that he was the picket captain that night. He did not see the incident but within minutes after it occurred Cook, who was very upset, told him that Crosson had punched her in the back and that she had turned around and kicked him. Although hearsay, the testimony of Ourlian and Lengel came in without objection and, in any event, it would fall within the "present sense impression" and/or "excited utterance" exceptions to

the hearsay rule. However, I find none of this is sufficient to establish that Crosson intentionally struck Cook.

While I credit Johnson's testimony that he observed Cook shove and kick Crosson and threaten to kick his "ass," it is hard to believe he did not hear her accuse Crosson of hitting her. The fact that Johnson did not see what Cook says precipitated the incident, Crosson striking her in the back, does not establish that it did not happen. Johnson did not have them in his view at all times. He said that, initially, Cook had her back to Crosson but that he did not recall seeing her turn around to face Crosson before she kicked him. He obviously was not looking at them at the crucial moment. I did not find Crosson's testimony to be completely credible. He first testified that although he had continuously worked in Detroit since a couple of weeks after the strike started, he had never spoken to a striker on a picket line. On cross-examination, he said that he had spoken to two male strikers on the picket line. Cook, Ourlian and Bowens all credibly testified to observing Crosson make derogatory comments to picketers and challenging them to fight, as well as referring to women picketers as "bitches" and "whores" and making vulgar gestures towards them. In his several accounts of the incident in the record, Crosson selectively remembered Cook's calling him a "motherfucker" and threatening "to kick his ass," but not that she had accused him of hitting her. I find this undermines his credibility.

Considering all of the foregoing, I find that Cook did shove and kick Crosson, which resulted in no injury to him, in reaction to her belief that she had been struck in the back by him. However, I also find that the evidence is inconclusive as to whether Crosson had in fact intentionally struck Cook before she reacted. Consequently, I am unable to find on the basis of a preponderance of the evidence that she was

provoked to an extent that would excuse her shoving and kicking Crosson. However, as is discussed below, I do find that the discharge of Cook was discriminatory and violated Section 8(a)(3) and (1) because she was treated in a disparate manner by The News by virtue of the fact that nonstriking employee Susan Stark was not discharged for similar misconduct that was at least as serious or more so than that of Cook.

4. Discharge of Carla Crawford

Carla Crawford has been employed by the DNA as a janitor at the North Plant since 1990. She is a member of Guild Local 22 and went on strike on July 13, 1995, and has not returned to work. During the strike, she served as a picket captain at the picket line in front of the News building. By letter, dated April 22, 1997, she was discharged for threatening and harassing a DNA employee, Mark Ellis, at the Communicating Arts Credit Union (CACU) on March 3, 1997.

Kelleher testified that he made the decision to discharge Crawford after reviewing documents relating to the incident. He did not talk to Ellis about the incident. The documents consisted of (1) a DNA incident report, dated March 3, 1997, signed by Mark Ellis; (2) an unsworn affidavit of Mark Ellis, dated March 10, 1997; (3) a report identifying the lessor of a vehicle with the license, "MS. VOICE;" and (4) a DNA Investigations report, dated March 3, 1997. Based on the information in these documents, he concluded that Crawford had verbally harassed Ellis over a 10-minute period at the CACU, calling him a "stupid nigger" and a "motherfucker," that she had threatened Ellis and his children, and that she should be discharged because of these actions.

Both Crawford and Ellis are African-Americans. Crawford testified that on the morning of March 3, after picketing at the News building, she drove to the CACU in downtown Detroit in her truck. When she arrived, she noticed a DNA truck parked nearby and saw the driver go to the CACU. She had seen the driver entering The News building before but did not know his name. As she reached the door, Ellis held it open for her and said, "Hello, how are you doing?," in a flirtatious way. She responded that she knew he was not talking to her and said that he had taken someone else's job. Ellis said, "Fuck those people, they should have never walked out" and Crawford responded, "Fuck you." They had a conversation while waiting in line at the CACU in which Ellis said that he had a family to feed and Crawford said she did also. Ellis said the strikers were stupid and should never have walked out. She told him that the DNA was unfair to them, that it was like slavery, that she supported the union, and that they would get their jobs back. Nothing more was said. She went to the restroom and when she returned Ellis was at the teller window. When she left the CACU, Ellis had made a U-turn and, as he passed her, she saw him look over and copy down the license plate of her truck. Crawford denied that she had threatened Ellis and said that she never used the word "nigger" when speaking with him.

Ellis testified that it was Crawford who initiated the conversation at the CACU when he held the door for her, saying, "Oh, I guess what they say about you scabs isn't all that bad." He said, "Thank you" and Crawford said, "fuck you motherfuckers, you ain't shit, fuck you niggers." Ellis said, "Why would you say something like that? All I'm trying to do is provide for my children." Crawford responded, "fuck you, fuck your kids" and said, "you won't have any kids to take care of." Later, Crawford, who was ahead of him in

line, said she was going to the restroom and someone in the line asked if she wanted her to hold Crawford's place. Crawford responded: "no, I'm not worried about it. He ain't crazy. I'll go out to my brand new Explorer. He don't want that." Ellis finished his transaction with the teller and went outside and copied "MS. VOICE" from the license plate of Crawford's vehicle. He went to the police station to file a complaint because he was concerned about her threat to go to her vehicle and her threat to his children. He also filed a report about the incident with the DNA and later identified Crawford from among several photo identification cards he was shown. At the hearing, he identified her from a photo in the record.

Analysis and Conclusions

The Respondent contends that, because this incident occurred after the Unions made unconditional offers to return to work on behalf of their members, the strike was over, and the incident did not occur at or near a picket line, the Board's *Rubin Bros.* analysis should not be applied in Crawford's case. I do not agree. Crawford had gone out on strike and had not returned to work at the time of the incident. It is clear that the incident itself was strike-related, arising from a confrontation between a striker and a replacement employee, and that it concerned their respective employment status because of the strike. It is also clear that the Respondent handled the incident according to the procedures that it had set up for reporting, investigating, and taking action on incidents of alleged strike misconduct. I find that Crawford had gone on strike and had not returned to work, that the Respondent was aware of those facts, and that it considered her to be a striker when it discharged her for a strike-related incident.

I find that the Respondent had a good-faith belief that Crawford had engaged in misconduct which warranted discharge. The alleged misconduct met the standard adopted by the Board in *Clear Pine Mouldings*, supra, in that "it may reasonably tend to coerce or intimidate employee in the exercise of rights protected under the Act." It is true that there are many cases in which the Board has found that verbal abuse of the kind alleged to have occurred here, no matter how vile and reprehensible, does not warrant discharge or refusal to reinstate so long as it is unaccompanied by an overt or indirect threat and there is no reasonable likelihood of an imminent physical confrontation.[18] Here, however, in addition to the verbal harassment and abuse, Crawford was also alleged to have threatened Ellis and his children with harm.

There is no dispute that Crawford was the person Ellis encountered at the CACU on March 3, 1997. She does not deny it. Ellis identified her picture and the vehicle from which Ellis copied the license number is registered to her. This is strictly a matter of credibility. Considering his demeanor and the evidence as a whole, I found Ellis to be an honest,

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[18] E.g., *Nickell Moulding*, 317 NLRB 826 (1995) (Striker carried a picket sign referring to a crossover employee, which read, "Who is Rhonda F Sucking Today?"); *Wayne Stead Cadillac*, 303 NLRB 432 (1991) (In the presence of a customer and his 8-year-old daughter, striker stated "Fuck you, tough shit, you came here," then grabbed his testicles and gyrated back and forth while mouthing the words "Fuck you."); *Calliope Designs*, 297 NLRB 510 (1989) (Striker called nonstriking employee a "whore," a "prostitute" and accused her of having sex with the company president and told another "she could earn more money by selling her nonstriking daughter at a flea market."); *General Chemical Corp.*, 290 NLRB 76 (1988) (Striker referred to employer's director of manufacturing as a "liar," "crook," and a "thief.").

credible witness. His direct testimony was clear, straightforward, and consistent with the affidavit he gave a week after the incident. Cross-examination did nothing to shake his story or to raise any doubts as to his veracity or recollection. I credit him over Crawford's self-serving testimony to the contrary. Although Crawford identified a co-worker of hers who was present at the CACU and with whom she spoke while this was going on and Ellis stated that several people present made derogatory comments among themselves about "scabs," no witness corroborated Crawford's version of the incident.

There is simply no reason, on this record, to believe that Ellis fabricated the incident, that he misunderstood what Crawford said, or that he would have reported the incident to the police and the Respondent if, as Crawford claimed, she did no more than refer to him as a "scab" and say "fuck you." They had no prior contact with each other. I find the fact that Ellis' initial report to the DNA, on the day of the incident, did not specifically mention Crawford's threat to his children does not detract from his credibility. In that report, Ellis filled in the "Type of Incident" space with: "Threat against my life, I feel is reel (sic)." He also stated that he had reported the incident to the police who took no action because no weapon was visible. The affidavit he gave the DNA, a week later, is consistent with his description of the threat to himself and his children at the hearing. The fact that Ellis did not leave the CACU immediately after the threat was made, but stayed to complete the transaction which brought him there, does not establish that there was no threat or that it was not serious. Likewise, the fact that Ellis is bigger than Crawford is not significant. The *Clear Pine* test is an objective one and does not call for an inquiry into whether any particular employee was actually coerced or intimidated. It also does not require that the threat be spelled out in detail

or involve an immediate physical attack. See *Axelson, Inc.*, supra at 865 & 883 (Striker's telling nonstriker, "be careful on your way to Kilgore, because I would hate for anything to happen to you," found to reasonably tend to coerce and intimidate). Here, Crawford was not threatening Ellis with immediate physical harm to his person at the credit union, but to himself and his family in the indefinite future.

I find that Crawford's statement that Ellis "won't have any kids to take care of" constituted a threat to his life and safety and/or that of his children which had a reasonable tendency to coerce and intimidate an employee in the exercise of statutory rights.[19] Consequently, it was not protected by the Act and was grounds for discharge. E.g., *Axelson, Inc.*, supra; *Gem Urethane Corp.*, supra at 1353-1354; *Clear Pine Mouldings*, supra at 1048. Considering all the evidence, I find that the General Counsel has not established by a preponderance of the evidence that Crawford did not engage in the misconduct for which she was discharged and has not proved a violation of the Act. I shall recommend that this allegation be dismissed.

5. Discharge of Floyd Davis, Jr.

Floyd Davis, Jr. has been employed by the DNA as a pressman since the JOA. Before that he had worked for the Free Press since March 1979. He is a member of GCIU Local 13N. He went on strike on July 13, 1995, and has not

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[19] It appears that Ellis also considered Crawford's statement that she would go out to her vehicle if he took her place in line and "he don't want that," as threatening. However, considering all of the circumstances, I find that the statement was ambiguous and cannot reasonably be said to have constituted a threat.

returned to work. By letter, dated April 18, 1996, he was informed that he had been discharged because he kicked and damaged a DNA van and threatened a DNA employee who performing of his job on November 4, 1995, in Allen Park, Michigan.

Kelleher testified that he made the decision to discharge Davis after reviewing documents relating to the incident. The documents consisted of (1) a statement of Sami Daher, dated February 5, 1996, concerning an incident at the Community Cracker Barrel Store in Allen Park, on November 4, 1995, and his identification of Floyd Davis as the person involved; (2) a copy of the photo identification card of Floyd Davis, Jr.; (3) a DNA-APT Report, dated February 8, 1996, concerning the November 4, 1995 incident and photographing damage to the hubcap of Daher's van; (4) a memorandum to John Anthony from Ed Coffman, dated November 4, 1995 concerning Daher's report of being verbally challenged on that date; and (5) a DNA memorandum from Mark Preisler, dated February 27, 1996, stating that the cost of replacing the damaged hubcap was $17.95. Based on the information in these documents, Kelleher concluded that an individual had verbally assaulted and challenged Daher to fight, that he had damaged the DNA vehicle Daher was driving by kicking the hubcap, and that Daher had accurately identified Davis as the person who did so. He felt this was intimidating to the employee and was not permitted.

Floyd Davis, Jr. testified that, on November 4, 1995, he had driven a friend, who has since died of cancer, to a doctor's appointment in Allen Park. After dropping the friend off, Davis, his wife, and two children, aged 5 and 3, went to lunch. They returned to the doctor's office and parked in front of the Cracker Barrel Store. Davis went into the office to see how much longer the friend would be, returned to his van,

and got some letters which he took to a nearby mailbox. When he returned to his vehicle, he noticed a DNA van was parked next to it and the driver was standing there counting newspapers. He told the driver "that it must be nice not to have a conscience about taking good union jobs." The driver responded that he had no conscience about it at all. Davis told him to have a nice day and returned to his vehicle. When the driver, who had gone into the store returned, Davis' children started hollering "scab" and "scabby" at him. The driver appeared to laugh and went back into the store. When the driver returned to his van, Davis' wife said to him "have a nice day scab" or "scabby." The driver got in his van and flipped her "the bird" or "the finger."[20] Davis got out of his vehicle, slapped the side window of the van, which was backing up, with his open hand, and told the driver if he "wanted to flip off somebody, flip me off." Davis said that he did not kick the van and did not threaten the driver or challenge him to a fight. He also testified that he was wearing tennis shoes that day, as he almost always does, that he suffers from diabetes, and at that time he also had a problem with ingrown toenails.

Sami Daher is employed by the DNA as a district manager. He delivers newspapers to stores and racks and collects money and unsold newspapers. He testified that, on

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[20] Not surprisingly, throughout the hearing there was a great deal of evidence concerning this particular type of gesture being "made," "given," "shown," or "flipped." The descriptions of the gesture often differed and there was some question as to the correct protocol to be followed in displaying it. (See colloquy at Tr. 3249.) There appears to be no dispute but that it is universally intended and construed as pejorative and/or obscene. For the sake of uniformity, throughout this decision, I have referred to the practice as "giving the finger."

November 4, 1995, he went to make a collection at the Community Cracker Barrel Store in Allen Park. As he was walking to the store, a white male, whom he identified as Davis, was putting mail in a mailbox and asked him how did he feel about being a scab. Daher ignored him and entered the store. As he returned to his vehicle, Davis' van was parked next to his. Davis, a woman, and a child in the van were calling him a scab and different names. He went back into the store to collect his money. When he came out and entered his van, Davis got out of his vehicle and walked towards him. Daher locked his door because Davis looked aggressive. Davis asked him to get out of his van and challenged him to a man-to-man fight. Daher continued to ignore him while he signed the envelope with the money and placed it in the safe. Davis banged on his van window at least twice, so hard that he was surprised that the window did not break. As Daher began to back up his van to leave, Davis kicked his hubcap at least twice. He testified that these actions scared him, so he looked at Davis' license number as he left the parking area and stopped to write it down a short time later. He identified pictures that were taken of his van on February 8, 1996, which show a dent in the left front hubcap.

Analysis and Conclusions

The Respondent contends that because there was no picket line or any strike-related activity going on in the vicinity of this incident, the Board's *Rubin Bros.* analysis should not be applied in Davis' case. I do not agree. I find that Davis was on strike at the time of this incident, which involved his attempt to remonstrate with an employee concerning his status as a strike replacement, and that in doing so he was exercising rights protected by the Act. There is no requirement that he be a part of some kind of formal strike-related activity in order to do so. I find that Davis had gone out on strike and

had not returned to work at the time of the incident, that the incident was strike-related, that the Respondent considered Davis to be a striker, and that it handled the matter according to the procedures it had set up for reporting, investigating, and taking action on incidents of alleged misconduct by striking employees.

I find that the Respondent had a good-faith belief that Davis had engaged in serious misconduct. The documents Kelleher examined indicated that Davis had verbally accosted Daher, banged on the window of his vehicle, challenged him to a fight, and kicked the vehicle, damaging the hubcap. This meets the *Clear Pine Mouldings* standard, in that, viewed objectively, it may reasonably tend to coerce or intimidate an employee in the exercise of protected rights.

I also find that the credible evidence concerning this incident establishes that Davis did not engage in the activities for which he was discharged and that what he did do was not grounds for disciplinary action against him. This is a matter of credibility. Having considered his demeanor and the content of his testimony, I do not credit Daher. His testimony about this incident makes little sense and was simply not believable.[21] According to Daher, he did nothing but ignore

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[21] At the conclusion of Daher's testimony, counsel for the DNA proposed noting on the record that Daher speaks English with a distinct accent, which indicates that he is not a native-born American. I offered counsel the opportunity to recall Daher to question him about any language difficulties he might have, but he had apparently already left the building. The hearing continued for many more days over several months, but Daher was not recalled. Having observed and heard him testify, I find there is no reason to believe that he was unable to effectively express himself in English at any time or that he did not understand any question that was posed to him at the hearing.

the comments directed at him by Davis and his family members. Yet, without any verbal response or gestures of any kind on Daher's part, Davis became increasingly aggressive and violent. First, I find it very unlikely that anyone, without provocation, would attempt to start a fight with a total stranger, in the middle of the day, in a public place, in the presence of his wife and two small children, while awaiting the imminent return of a seriously-ill friend from a doctor's office. Aside from that, if it was Davis' intent to challenge Daher to a fight (for saying and doing nothing), why didn't he do so when he first spoke to Daher about taking union jobs? According to Daher, he ignored Davis' comment and Davis returned to his van. Sometime later, after Daher had supposedly done nothing but continue to ignore the Davis family's chants of "scab," and was about to leave the area, Davis got out of his van, challenged him to a fight, and started banging on and kicking Daher's moving vehicle.

Davis' version of the incident makes much more sense and I credit his testimony which was corroborated in large part by the equally credible testimony of his wife Toni.[22] I find that the incident occurred as Davis testified. He candidly admitted initiating the exchange by asking Daher what was probably a rhetorical question about whether his conscience bothered him. Daher's response, that it did not, was probably not unexpected and was unlikely to provoke Davis. Davis also described the less than edifying scene in which his small children chanted "scab" at Daher as he went about his

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[22] Although I recognize that both have a pecuniary interest in the outcome of this matter, having observed their demeanor while testifying, both impressed me as telling the truth. Toni Davis admitted that she could not recall everything that her husband did after he got out of their van and approached Daher's vehicle, other than saying "if you want to flip somebody off, flip me off."

business. Daher, he said, appeared to laugh about it. Daher had apparently had enough though when Toni Davis told him "have a nice day, scabby" and he responded by giving her the finger. This elicited a response from Davis, who got out of his van and told Daher if he "wanted to flip off somebody, flip me off" and slapped the closed window of Daher's vehicle. He did not challenge Daher to fight him and did not kick his vehicle.[23]

I find that Davis' approaching Daher and asking him if his conscience bothered him for taking a union job falls within the bounds of "peaceful persuasion" and was not so outrageous or egregious as to lose the protection of the Act.[24] Likewise, the chanting of "scab" at Daher by his family members, even if he instigated it and/or joined in, did not constitute serious misconduct. See *Calliope Designs*, supra. Finally, under the circumstances, I find that Davis' response to Daher's provocation (giving his wife the finger) by slapping the van window without damaging it or delaying

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[23] Even if Daher subjectively misunderstood what Davis was saying, that does not convert "flip me off" to "I want to fight you man to man," a statement Davis did not make.

[24] Under the *Clear Pine* standard, in certain circumstances, a profane epithet alone can be coercive if it raises a reasonable likelihood of an imminent physical confrontation. See *Catalytic, Inc.*, supra at 98. That was not the case here as Davis used no profanity. After asking Daher about his conscience, Davis said nothing more to him and returned to his vehicle. Later, in response to Daher's obscene gesture directed to his wife, Davis invited Daher, who was already in his vehicle and pulling away, to repeat it to him. Daher declined and drove away, ending the incident. I find that any likelihood of a physical confrontation arising from this part of the incident was attributable to Daher, not Davis.

Daher's exit, was not serious misconduct and did not warrant discharge. See *Medite of New Mexico, Inc.*, supra. Having discredited Daher's testimony about the incident, I find there is no evidence that Davis caused the damage to the hubcap of Daher's van. Davis denied doing it and his credible testimony about his physical condition makes it unlikely that he could have done the damage with his foot. The photograph of the damage was not taken until over three months after the incident. The van had presumably been making daily deliveries before and after November 4, 1995. There is no reliable proof establishing when or how the damage happened. Even to an untrained eye, the damage that is depicted in the photograph is consistent with a hubcap bumping into a curb.

I find that the General Counsel has established that Davis did not engage in the misconduct for he was discharged and that his actions on November 4, 1995, did not constitute serious misconduct under *Clear Pine Mouldings*. Consequently, I find that the Respondent, DNA, violated Section 8(a)(3) and (1) by discharging Floyd Davis, Jr.

6. Discharge of Anthony Edwards

Anthony Edwards has been employed by the DNA since the JOA as a district manager at the Southfield Distribution Center. He had previously worked for one of the newspapers since August 1984. He is a member of Teamsters Local 372. He went on strike on July 13, 1995, and has not returned to work. By letter, dated July 31, 1995, he was informed that he was being discharged for placing an object under a carrier's vehicle on July 16, 1995, which caused the tire to go flat and jeopardized the carrier's health and safety. As is discussed in the section concerning the discharge of Henry Thompson, below, the Respondent was later told by a returning striker,

Jesse Kennedy, that he had seen Thompson puncture the tire in question and that Edwards did not do it. By letter dated, April 23, 1996, the Respondent rescinded Edwards' discharge and offered to reinstate him. Edwards testified that although he had considered returning to work before he was discharged, when he received this reinstatement offer, he declined because he was afraid that he "would be railroaded again."

Edwards testified that he was present at the Southfield Distribution Center on July 16, 1995 and that he saw Charlene Brown, the carrier whose vehicle was allegedly damaged, exit through the picket line that morning. He said that he was standing 20 to 25 feet away from her vehicle at the time she approached the picket line. She slowed down for a few seconds to let some picketers go by, then sped up and left without any apparent difficulty. About a week later Brown, who had once worked for him, came to him and told him he was in trouble for flattening a tire on her vehicle. He testified that he did not see any damage to Brown's tire that night and did not see anyone puncture it as it crossed the picket line.

Analysis and Conclusions

I find that the Respondent has not established that it had a good-faith belief that Edwards engaged in strike misconduct when it discharged him. The person who made the decision to discharge him, former circulation department head Tommie McLeod, was not called as a witness; consequently, there is no way of knowing why she made that decision.[25] Although

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[25] It was represented that McLeod is no longer in the Respondent's employ and has relocated to Florida.

Kelleher testified that the affidavits of the Browns were in a file with a copy of the discharge letter sent to Edwards, I find this insufficient to establish that McLeod had a good-faith belief that Edwards was guilty of misconduct. In any event, the Respondent subsequently determined that Edwards did not engage in misconduct he was accused of and rescinded his discharge while the strike was still going on. Edwards credibly testified that he was not near Brown's vehicle when he was alleged to have damaged it, that he did not see anyone else damage it, and that he did not see any evidence that it had been damaged. I find that the Respondent's discharge of Edwards and its failure to offer to reinstate him after the strike ended violated Section 8(a)(3) and (1).

7. Discharge of Michael Evich

Michael Evich has been employed by the DNA since the JOA as a district manager at the Lincoln Park Distribution Center. He had previously been employed by the Free Press from January 1986. He is a member of Teamsters Local 372. He went on strike on July 13, 1995, and has not returned to work. He testified that during the strike he did picket line duty at the Lincoln Park facility. By letter, dated November 16, 1995, he was informed that he had been discharged for throwing "a liquid substance on the car of a DNA carrier as she was exiting the Lincoln Park Distribution Center, obscuring the driver's vision and causing damage to the car," on August 25, 1995.

Kelleher testified that he made the decision to discharge Evich after reviewing documents relating to the incident. The documents consisted of (1) an unsigned, unsworn, and

undated affidavit of the carrier, Tracey Neese;[26] (2) a Lincoln Park Police report, dated August 25, 1995; and (3) a copy of Evich's photo identification card. Based on the information in these documents, he concluded that Evich had thrown a liquid substance on the windshield of Neese, as she was exiting the distribution center. She reported that the substance foamed up and interfered with her vision and caused some damage to the paint of the vehicle. He concluded that this impeded the carrier from doing her job, that it endangered her and others, and that it was cause for discharge.

Evich testified that the incident for which he was discharged occurred on August 18, 1995, while he was picketing at the North driveway of the Lincoln Park Distribution Center. He testified that during the afternoon he saw a car accompanied by two Lincoln Park police officers stop approximately 100 feet from where he and other picketers were standing. The police officers had a conversation with the woman in the car who was pointing in the direction of the picketers. The police officers came over and asked another picketer, Lynda Detloff, and him for identification. The police told him he was accused of throwing something on the woman's car and that, if there had been any damage to it, he would have been arrested. He was not arrested and he has never been charged with a crime in connection with the incident. Evich testified that he recalled seeing the same car exit the facility about 2 hours earlier that afternoon. He said that as the car neared the picketers he was on the driver's side of it and that he moved off the driveway to an adjacent grassy area, 4 to 6 feet from the curb. As the

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[26] Kelleher subsequently received an identical copy of Neese's affidavit which was signed and sworn to before a notary on November 17, 1995.

car passed him, he had his back to it and he did not say anything or throw anything at it or see anything thrown at it.

Tracey Neese testified that she came to Detroit from Pensacola, Florida, to work for the DNA as a carrier in August 1995. She first worked out of the Lincoln Park Distribution Center delivering newspapers in various neighborhoods. She stayed in a hotel and used a rental car to make deliveries. On August 29, she went to the Lincoln Park Distribution Center to transact some business and, as she was leaving the facility, a group of picketers were blocking the entrance. They moved off to the side and she proceeded forward after stopping at the stop sign. As she did so two persons, one on each side of the car, threw cups of an oily liquid on the windshield which smeared when she tried to wipe it off with the wipers. She stopped a few blocks away and again at a gas station to rinse the substance off. She returned to her hotel and later went to the rental agency because there was paint peeling off the hood of the car. She identified Evich from the photo identification card in evidence as the person who threw the substance from the passenger side of her car. On cross-examination, Neese testified that Evich was only a foot from her car "because he stepped forward to throw the liquid on the car." But she also testified that the substances were thrown almost simultaneously from both sides. As they were thrown, she looked to the left and saw Detloff, but she "could not see exactly who was throwing that liquid" from the passenger side. On redirect, she testified as follows:

> Q. (By Mr. Vercruysee) Ms. Neese, Mr. Radtke asked you questions about whether or not you could tell who had thrown the liquid substance at you from the right side.
>
> A. Yes sir.

Q. Could you tell who did that?

A. No, I guess I couldn't. Not completely. I can remember who was standing there before and who was holding a cup before they threw it and--

Q. Was anyone holding a cup?

A. No.

Q. Okay. So the only one holding a cup was Mr. Evich?

A. Yes sir.

Q. And it was based up (sic) that he was holding the cup as you were driving through that you came to the conclusion that he threw it towards you?

A. Yes sir.

Lynda Detloff testified that she worked for the DNA for several years prior to the strike. She was a member of the Teamsters Union and went on strike on July 13, 1995. She was present at the picket line at the Lincoln Park Distribution Center in August 1995 when this incident occurred. She testified that she had brought a container of vegetable cooking oil with her that day and that she poured oil into three or four white styrofoam cups and placed them on the ground by the side of the driveway. She said that she had seen Neese drive through the picket line before and that she felt Neese angled her car "at the pickets like she was going to hit them." As Neese passed her, Detloff was on the passenger side of the vehicle and she threw the contents of a cup of vegetable oil onto the windshield of the car. She testified that at the time Evich was standing directly across from her on the other side of the car, that she could see him plainly, that he had nothing in his hand, and that he did not throw anything at Neese's car. She said that she threw only one cup and that after this incident she dumped out the remaining cups of oil on the ground. About a couple of hours later, Neese returned with a police officer. The police officer spoke to Evich out of her

hearing and then came over and spoke to her. She was not arrested or charged with anything as a result of this incident but, in November 1995, she got a letter from the DNA telling her she was discharged.

Analysis and Conclusions

I find that Evich was on strike at the time of the incident for which he was discharged, that it took place at a picket line, and that the Respondent considered him to be a striker. I also find that the Respondent has established that that it had a good-faith belief that Evich had thrown a substance on Neese's windshield that obstructed her view and could have caused an accident and that it damaged the paint on the vehicle. The information in the police report indicates that Neese identified Evich at the picket line as one of the persons who threw the substance at her car. Her affidavit confirmed that identification.

I also find that the General Counsel has shown that Evich did not engage in the alleged misconduct for which he was discharged. Evich denied throwing anything at Neese's car and the evidence as a whole establishes that he did not. I found Evich to be a credible witness, notwithstanding the self-serving nature of his testimony, based on his demeanor and the other evidence about this incident. I believed his testimony that this was a significant event in his life in that it was the only time he has ever been questioned by the police. I find it likely that, under such circumstances, he would have a strong recollection of everything that occurred that day. I also believed Detloff's testimony that she was the only one who threw the liquid on Neese's car; that at the time of the incident she had Evich in sight; that he was on the driver's side of the vehicle; that he had nothing in his hand; and that

he did not throw anything at the car.[27] She is not an alleged discriminatee in this proceeding and there is no reason to believe that she would be willing to commit perjury in a matter in which she has no interest. Moreover, her testimony as a whole is against her pecuniary interest and unlikely to be false. Neese, on the other hand, was not an impressive or believable witness. While I do not think she intentionally sought to mislead, several factors lead me to discredit her testimony. Most important was the fact that she first implied that she had seen Evich throw the liquid at her car but later admitted that she did not see him throw anything and did not know who did. She merely assumed Evich did it because she thought she had seen him with a cup in his hand. Also, her memory of the entire incident was suspect. At the hearing, she apparently had no memory of talking to the police at the time of the incident as she failed to mention it. In the affidavit she gave the DNA in November 1995, she said it occurred on August 29, 1995, and did not dispute that date when the Respondent's counsel directed her attention to it at the hearing. The police report in evidence and the testimony of Evich establish that it happened on August 18, 1995.[28]

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[27] Even if she momentarily lost sight of Evich when she threw the liquid at the car, he had nothing in his hand to throw during that instant.

[28] In her affidavit Neese also states that there was no damage to the vehicle's paint on August 28, 1995. This is a small point, but it is evidence that she had little concern for details or precision. Similarly, at the hearing, when asked if both Detloff and Evich had used similar cups to throw the liquid, she said "they were both yellow." In her affidavit, she said she saw Detloff throw a blue plastic cup at her windshield and Evich do the same.

Based on the credited testimony of Evich and Detloff, I find that Evich Was not on the passenger side of Neese's vehicle when the liquid was thrown at it and that he did not throw anything at Neese's windshield, as she alleged. Consequently, I find that he did not engage in the strike misconduct for which he was discharged and that his discharge violated Section 8(a)(3) and (1).

8. Discharge of Michael Fahoome

Michael Fahoome has been employed by the DNA since the JOA as a district manager at the Hayes Distribution Center. He had previously worked for the News since December 1975. He is a member of Teamsters Local 372, a steward, and had served as recording secretary for 6 years prior to October 1995, when he lost an election for president of the Local. He went on strike on July 13, 1995, and has not returned to work. By letter, dated October 16, 1995, he was informed that he was being discharged for threatening the safety and health of a newspaper carrier at the Hayes Distribution Center on September 5, 1995.

Kelleher testified that he made the decision to discharge Fahoome after reviewing a number of documents relating to the incident. The documents were (1) a copy of Fahoome's identification card; (2) a strike incident report, dated September 6, 1995, filed by DNA Supervisor David Ludwiczak; and (3) an unsworn affidavit of Charlene Krause, dated September 29, 1995. Based on the information in these documents, he concluded that Fahoome had threatened Krause's job and indicated to her that there would be an explosion of some type and that this was cause for discharge.

Fahoome testified that he did not believe that he was present at the Hayes Distribution Center on September 5, but

he could not recall positively that he was not there because of the extensive strike activity in which he was involved during that Labor Day weekend. He denied that he had ever threatened a carrier. He testified that he knew that Charlene Krause, the person he was accused of threatening, was a carrier in a district next to his and that he had assisted her in getting newspapers on occasions when her manager was not present but that he did not learn her name until after he was discharged. No criminal charges were ever filed against him as a result of this alleged threat.

At the hearing, Krause, the alleged victim of the threat, was called as a witness by the Respondent and testified that, as she crossed the picket line on the day in question, Fahoome and another person came up to her van which had its windows closed. Fahoome called her a "scab" and said, "when I get back you won't have your routes" and "you won't have your van." She also testified: "Mr. Fahoome did not say that my van would go up—boom. It was the other guy who said that." She testified that her affidavit was taken by an attorney and that she "didn't say half the stuff that was in there." She said that at the time the affidavit was prepared she did not carefully read it all but just signed her name so she would not be late delivering her newspapers. She specifically denied saying anything about "a pipe bomb." She testified that Fahoome did not scream obscenities at her but that the other person might have. Krause candidly admitted that she is very angry with the DNA and has quit delivering newspapers for it. This was because, in 1997, she was taken off the routes she had delivered for 8 years, she was given new routes in an area with which she was unfamiliar, and the method by which her customers paid for their newspapers was changed. She denied that her feelings about the DNA would cause her to lie at the hearing.

Analysis and Conclusions

I find that the incident for which Fahoome was discharged allegedly took place at a picket line, that he was on strike at the time of the incident, and that the Respondent considered him to be a striker. I also find that the Respondent has established that it had a good-faith belief that Fahoome had seriously threatened Krause. In her affidavit, Krause stated that Fahoome and another picketer had approached her vehicle as she left the distribution center and screamed obscenities at her. She quoted Fahoome as saying, "I'll see to it that you don't have a vehicle to deliver those papers" and "it will go up just like the plant." Then, he said: "BOOM!" I find this is sufficient to support a good faith belief that Krause was told that her vehicle would be blown up. Considering all of the circumstances,[29] such statements would constitute an explicit threat to destroy Krause's property and physically endanger her person and would constitute serious misconduct. Cf. *Chesapeake Plywood*, supra at 205.

I find that the General Counsel has established that Fahoome did not engage in the misconduct for which he was discharged. Fahoome was a believable witness and I credit his testimony that he never threatened to do harm to Krause or to any carrier, or to do anything to a carrier's property.

There is no probative evidence that Fahoome threatened "the safety and health" of Krause, the act for which he was discharged. I find that the affidavit Krause signed more than

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[29] Kelleher credibly testified that, around the same time, a single-copy driver had found what turned out to be a pipe bomb in a newspaper rack and had brought it back to the plant in his truck. After it was identified as a bomb, it was detonated by the police.

3 weeks after the incident, which she essentially repudiated at the hearing, has no probative value except to undermine her overall credibility.[30] That affidavit, which is unsworn, is not in Krause's handwriting, and she says she did not carefully read before signing, appears to be more the creation of an overzealous advocate than a statement of fact. For example, the reference to a pipe bomb being found at the North Plant. The affidavit states that Fahoome told Krause that her vehicle would "go up just like the plant" and then said: "BOOM!" [Emphasis added by the author of the affidavit.] However, as the affidavit itself indicates, that "plant" incident did not occur until after September 5, the date Fahoome supposedly referred to it. Moreover, the plant did not "go up," rather, a pipe bomb was brought to the plant by a clueless DNA driver and, after being discovered, it was safely detonated by the police. Krause denied that she mentioned anything about a pipe bomb when questioned.

Krause's testimony at the hearing, if credited, would establish only that Fahoome called her "a scab," told her that after the strike he would be back but that she would not have her routes or her van.[31] However, even this is at odds with

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[30] In its brief the Respondent asserts that the statements in Krause's affidavit are "clearly admissible for the truth of the matter asserted as prior inconsistent statements," under FRE 801(d)(1)(A). This is clearly incorrect as the statements in the so-called affidavit, inconsistent though they may be, were not given under oath.

[31] I find that such statements, without more, are ambiguous and do not constitute a threat by Fahoome to Krause's safety or health or to damage her property. Krause did not work for Fahoome and he had no control over her routes. Ironically, the statements are consistent with what happened to Krause at the hands of the Respondent.

the incident report she filled out the day after the incident. The portion of the report that Krause wrote out herself is concerned with a star nail she found in her tire shortly after Fahoome allegedly told her something would happen to her van. Ludwiczak, the person to whom Krause made the report, testified that, at the time, she appeared to be upset because she got a flat tire. There is nothing in the report about a bomb or Fahoome saying "boom." It is difficult to believe that, if she had actually heard Fahoome, or anyone else, threaten that her van would be blown up, she would not have mentioned it in the incident report and/or would not have reported it to the police. It appears that, at the time she made the report, she was attempting to link Fahoome to the damage to her tire, allegedly caused by a star nail, possibly, to obtain reimbursement from the Respondent.

Considering all of the foregoing and her demeanor while testifying, I am unable to credit any of Krause's testimony. Consequently, I find there is no credible evidence to contradict Fahoome's credible testimony that he did not threaten Krause or her property. Since Fahoome did not engage in the alleged strike misconduct for which he was discharged, that discharge violated Section 8(a)(3) and (1).[32]

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[32] Insofar as the Respondent in its brief now contends that Fahoome was properly discharged because he was supposedly standing near another picketer who threatened to blow up Krause's vehicle, I find there is no credible evidence that such a threat was ever made. There also is no credible evidence that Fahoome was even present at the Hayes Distribution Center on September 5, 1995, let alone that he was vicariously guilty of failing to repudiate an alleged threat by an unidentified third party.

9. Discharge of Kurt Final

At the time of the strike, Kurt Final was employed by the DNA as a mailer. Prior to the JOA he had worked for the News since 1982. He is a member of Teamsters Local 2040, went on strike on July 13, 1995, and has not returned to work. He testified that during the strike he did picket duty at the North Plant. By letter, dated February 2, 1996, he was informed that he was discharged for throwing star nails in the driveway of the Harper Woods Distribution Center on October 4, 1995.

Kelleher testified that he made the decision to discharge Final after reviewing documents relating to the incident. The documents were (1) an LSS Investigations Form, dated October 4, 1995, describing the incident; (2) a Harper Woods Police report by Officer Bensinger, dated October 4, 1995; (3) a Harper Woods Police report by Sergeant Selvaggi, dated October 4, 1995; and (4) a copy of Final's photo identification card. Based on the information in these documents, he believed that Harper Woods police officers had observed Final dropping a tire spike or star nail at the picket line and, after searching him, had found spikes on him. He concluded that Final had attempted to impede traffic and to cause damage to vehicles of the Respondent and its carriers by throwing star nails in the driveway, that such action was not protected and warranted discharge.

Final testified that he was among a group of 30 to 50 picketers at the Harper Woods Distribution Center that night. He arrived about midnight and about 20 minutes later 2 vans with security guards turned in from the service road to cross the picket line. As the picketers tightened around the vans, they both stopped and then edged forward, crossing about 4 feet from where he was standing. He had a picket sign in one

hand and a cigarette in the other. As the vans were edging their way in, he threw his cigarette on the ground and 3 of 4 minutes later a police officer grabbed him and took him to a police car. The police officer searched him and found a marijuana joint. He was arrested, taken to the Harper Woods police station, and charged with possession of marijuana and malicious destruction of property under $100. He said that he threw nothing but a cigarette on the ground that night, that he has never thrown star nails, and the he has never seen anyone else throw star nails. He told the police officer that he had not thrown any star nails and none were found in his possession when he was searched. He also said that, on the way to the police station, the arresting officer told him that if he had not had the marijuana on him he would have been let go because he had no other objects in his pocket.

Sergeant Ralph Selvaggi of the Harper Woods Police Department testified that he was present at the picket line when the 2 vans with security personnel arrived. As the police officers were attempting to open up the crowd of picketers to permit the vans to enter the driveway, a number of star nails were thrown.[33] He stopped the vans so that the nails could be picked up. He told the crowd to stop throwing star nails and that anyone who did would be arrested. After a path was cleared, the vans moved forward. As he was standing there, holding people back, he saw an arm in a flannel shirt come alongside him from behind and saw the hand release a star nail which hit the ground. He immediately turned around and grabbed the person whose arm he had seen. That person was wearing the same flannel shirt and bib overalls. He placed the person, who was subsequently identified as Final, under arrest

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[33] He testified that he uses the terms "star nail" and "tire spike," synonymously, although the size and design may differ.

and turned him over to another officer. Sgt. Selvaggi then attempted to retrieve the star nail that he had seen thrown but was unable to find it in the crowd, which he said was moving around. He said that while he was searching he heard what sounded like a nail falling into a storm drain, although he did not see it, and that the nail was not recovered. He testified that while he cannot describe the exact shape and size of the object, it looked similar to star nails he had previously seen and that it made a metallic sound when it hit the ground.

Officer Robert Bensinger, to whom Final was turned over after he was arrested, testified that he was directed by Selvaggi to arrest him for malicious destruction of property. When he searched Final, he recovered a plastic bag containing marijuana in the top front pocket of his overalls. He denied speaking to Final of the way to the station or telling him that if it were not for the marijuana he would have been let go. Bensinger also testified that he had observed Final strike one of the vans with his picket sign but that when he returned to the scene and inspected the vans, he found no damage.

Analysis and Conclusions

I find that Final was on strike at the time of the incident for which he was discharged, that it took place at a picket line and that the Respondent considered him to be a striker. I also find that the Respondent has established that it had a good faith belief that Final had thrown a star nail or tire spike at a picket line.[34] Such an attempt to damage and/or impede

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[34] Although the hearing testimony of Kelleher incorrectly implied that tire spikes were found on Final's person during the police search, when in fact they were found on the pavement at the

vehicles crossing a picket line constitutes serious misconduct and is sufficient justification for discharge. E.g., *Beaird Industries*, 311 NLRB 768, 795-796 (1993); *Columbia Portland Cement Co.*, 294 NLRB 410, 420 (1989).

I found Sgt. Selvaggi to be a credible witness and do not doubt that he saw a metallic object, similar to other star nails he had seen, being thrown onto the pavement that night. Although, at the time, there were other people around, and the object was thrown from behind him, he was able to immediately grab Final's arm, which was beside him when the object was released. He could also match the shirt Final was wearing with that he saw on the arm when it made the throwing motion.[35]

The contrary evidence is Final's self-serving claim that he did not throw the star nail and the testimony of fellow striker Richard Stringer that he was standing nearby but did not see him throw anything. Stringer's testimony fails to establish that he had Final in view at the time Selvaggi says he threw the star nail. Stringer's testimony was that he was standing 5 feet

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scene, the fact that he was observed by a police officer throwing a tire spike was sufficient to support a good faith belief that he was guilty of misconduct.

[35] The circumstances in this case are entirely different from those in the case of Robert Heckart, discussed below, in which I have found that the identification of Heckart as the perpetrator in a rock-throwing incident was completely unreliable. Heckart was identified more than 15 minutes after that incident by a witness who had no knowledge of the perpetrator's physical or facial features and whose identification was based solely on the fact that he was wearing blue jeans. Here, Final was seized by a police officer within an arm's reach immediately after throwing a star nail.

behind Final when the vans were leaving the facility. However, both Final and Selvaggi testified that the incident occurred as the vans were entering. In any event, the fact that Stringer did not see Final throw a star nail does not establish that he did not do so, anymore than his testimony that he did not see anyone else throw star nails that night proves that none were thrown. In any event, his testimony does not directly contradict that of Selvaggi. Final admitted making a throwing motion with his arm near the vans, but he claimed that he was throwing away a cigarette and that several minutes passed before he was arrested. I credit the testimony of both police officers, that Final was seized and arrested immediately after making that throwing motion.

I find that the testimony of Final and Stringer casts no significant doubt on the credible testimony of Sgt. Selvaggi. Therefore, the General Counsel has not established by a preponderance of the evidence that Final did not engage in the misconduct for which he was discharged and has not proved a violation of the Act. I shall recommend that this allegation be dismissed.

10. Discharge of Marcus Franklin

Marcus Franklin has been employed by the News as a reporter since September 1993, having previously worked there as an intern while attending college. He is a member of the Guild. He went on strike on July 13, 1995, and has not returned to work. During the strike, he engaged in picketing outside the News building. By letter, dated August 31, 1995, he was informed that he had been discharged for threatening to do harm to a newsroom editor on August 22, 1995.

Giles testified that he made the decision to discharge Franklin after speaking with Luther Keith, the editor to whom

Franklin allegedly made a threat, and reviewing certain documents. The documents were (1) a copy of the photo identification card of Marcus Franklin; (2) an unsworn affidavit of Luther Keith, dated August 24, 1995, concerning an incident involving Franklin on August 22; and (3) a memorandum from Keith to John Taylor, dated August 31, 1995, concerning a telephone call he received from Franklin the day after the incident. Giles testified that, on the date of the incident, Keith, who at the time was an assistant managing editor of The News, came to him looking visibly upset. Keith told him that as he left The News building to go to lunch, he encountered Franklin, who said he would kick Keith's "ass" and blow up his house, threats which Keith considered serious. He was aware of the relationship between Keith and Franklin, both of whom are African-American, arising out of Keith's involvement in the Journalism Institute for Minorities at Wayne State University, under which Franklin had attended college and worked as an intern at The News, that Keith had served as a mentor to Franklin, and had assisted him in starting his career as a reporter. Based on his conversation with Keith and his affidavit about the incident, Giles concluded that Franklin has made a direct threat to do physical harm to Keith and his family and that he should be discharged.

Keith testified that he had recruited Franklin into the Wayne State program and into an internship at The News and had hired him as an editorial assistant. On August 22, as he was going to lunch, he saw Francis Hopkins and wanted to talk with him about a rumor that was circulating concerning his actions at a convention of black journalists held in Philadelphia. As he approached Hopkins, Franklin jumped between them, screaming, "Why did you call security on Francis?" Keith told Franklin to shut up, that he was not talking to him. Franklin said he would kick Keith's "ass" and

that he would blow up Keith's big house in Palmer Woods. Keith asked if he was threatening him and Franklin said something to the effect of: "yes, I am, what are you going to do about it?" After someone pulled Franklin away, Keith spoke briefly with Hopkins and left. After he returned from lunch, Keith went to Giles and told him what had happened. Giles referred him to Taylor who took his statement about the incident. Keith testified that he has a house in Palmer Woods where he lives with his wife and 6-year old child, that Franklin had never been to his home, but that he had discussed where he lived with Franklin and other reporters. Keith said that he was stunned by Franklin's conduct as he had done a lot to help him, that he had never seen Franklin act like this before, and that, while he did not know if Franklin meant what he said, he felt it was something that had to be taken seriously and be reported. He testified that he did not push Franklin during the incident and did not touch him in any way. He said that Franklin telephoned him the next day. Franklin said that "the threat wasn't real," and that Keith should not have told him "to shut up." When Franklin said nothing further, Keith said he had to go to a meeting and hung up the phone.

Franklin testified that, on August 22, as he was picketing outside The News building with about a dozen picketers, including fellow reporter Hopkins, Keith came along and stopped to speak with Hopkins. Franklin said that it was his understanding that earlier that summer, Keith was responsible for having Hopkins and Greg Bowens ejected from a convention in Philadelphia because they had engaged in activities in support of the strike. He said he "sidled" up to Keith and in a calm voice asked him about the convention incident. Keith put his hand on Franklin's chest and pushed him away, causing him to stumble back 2 or 3 feet. Keith pointed his finger at Franklin and in a loud, hostile voice told

him to "shut up" because he wasn't talking to him. Franklin told Keith that it was not wise of him to come to the picket line and push someone around and that doing things like that could get his house blown up, if he did it to the wrong person. Keith asked Franklin if he was threatening him. Franklin said he was not. Keith spoke briefly with Hopkins and returned to the building. A few days later, Franklin telephoned Keith and told him he wanted to get things sorted out because he did not "want things to get personal." Keith said he did not have time for this bullshit, that he had a meeting to attend, and hung up. Franklin denied that he had told Keith that he would kick his ass or that he had said that he, himself, would blow up Keith's house.

Analysis and Conclusions

The Board applies an objective standard to determine whether strikers' threats constitute serious misconduct under *Clear Pine Mouldings*. The Respondent had evidence that Franklin threatened to physically attack Keith at the picket line by kicking his "ass" and threatened his safety and that of his family by threatening to blow up his house. I find that the Respondent has established that it had a good-faith belief, based on the oral and written statements given by Keith, that Franklin had made these threats to a management representative. By doing so, he engaged in serious misconduct. E.g., *Cal Spas*, 322 NLRB 41, 61-62 (1996); *Gem Urethane*, supra; *Chesapeake Plywood*, supra.

The remaining question is whether Franklin actually made these threats. Keith says Franklin told him he would "blow up his big house in Palmer Woods," and that he would kick his "ass." After that, in response to Keith's question, Franklin assured him these were, in fact, threats. Franklin says he was misunderstood or that Keith turned his cautionary advice,

about what could happen if he pushed and said "shut up" to the wrong person on the picket line, into a threat. He denied saying he would kick Keith's "ass" and, said that, in response to Keith's question, he assured him that he was not threatening him.

This is entirely a matter of credibility. I found nothing in Keith's demeanor, the content of his testimony, or his actions in response to Franklin's statements which suggests that he was not being truthful. On the contrary, his reaction to his encounter with Franklin, which was to immediately go to Giles, the publisher of the newspaper, to report what had happened, lends credence to his story. So does Giles' description of Keith when he did so, that he was visibly upset about Franklin's threats. Moreover, even if Keith had misunderstood what Franklin had said about who would blow up his house, there is no reason to believe he would fabricate the additional threat about Franklin kicking his ass if it hadn't happened. It was a minor matter in comparison to blowing up his house, but it would have undermined his entire story if someone who was nearby during the incident, such as Hopkins, denied that Franklin had said it.

I also found nothing in Franklin's demeanor which cast doubt on his veracity. However, his self-serving testimony, which, in some respects, differed only slightly but significantly from that of Keith, struck me as an attempt at revisionism. He tried to turn a threat to bomb Keith's house into cautionary advice concerning what others might do to him. Being unable to similarly finesse his unambiguous threat to kick Keith's "ass," he simply denied it. I find it unlikely that Keith, who had helped Franklin to get a college scholarship, an internship, a job at The News, and served as his mentor, would get so upset at Franklin that he would refuse to talk to him, tell him to shut up, and push him

backwards, all because Franklin had merely inquired in a calm voice about the convention incident involving Hopkins and Bowens, the same incident that Keith intended to talk about with Hopkins. I find it much more likely that, once he heard Keith raise the subject of the convention with Hopkins, Franklin interjected himself into their conversation as Keith described. I also find that Franklin's pinpointing Keith's house as being in Palmer Woods, added menace to an already serious threat.

If, as he testified, Franklin had not threatened to kick Keith's "ass" or that he would blow up Keith's house but had only cautioned him and, in response to Keith's question, made it clear he was not making any threats, why did he call Keith the next day? Franklin says it was because he was surprised by what had happened, that they had a good relationship up to that point, and he wanted to get things cleared up. But when he called, Keith wouldn't talk to him and slammed the phone down. Keith says Franklin called to say that what he had said the day before was not a threat. When he said nothing more, Keith told him he had to go to a meeting and hung up. Again, I credit Keith and find that this subsequent conversation undermines Franklin's denial that he threatened Keith the previous day.

Finally, Hopkins, the person who was presumably in a position to corroborate Franklin's version of the incident, was called as a witness by the General Counsel and questioned in connection with his own discharge, but was not asked about this incident. There is no reason to believe that he did not see and hear the exchange between Franklin and Keith on August 22 or that he would not be favorably disposed towards Franklin and/or the Guild. I infer that his testimony about this incident would not have supported Franklin's version of what transpired that day.

Having credited Keith's testimony about this incident, I find that the General Counsel has not established by a preponderance of the evidence that Franklin did not engage in the serious misconduct for which he was discharged and has not proved a violation of the Act. However, as is discussed below, I do find that the discharge of Franklin was discriminatory and violated Section 8(a)(3) and (1) because he was treated in a disparate manner by The News by virtue of the fact that non-striking employee Susan Stark was not discharged for misconduct that was at least as serious or more so than that of Franklin.

11. Discharges of Camel Gavin and Ellison Summerville

Camel Gavin and Ellison Summerville were discharged as a result of their alleged conduct on September 11, 1995, at the Southfield Distribution Center.

Gavin has been employed by the DNA since the JOA as a paper and plate handler. He had previously worked for The Free Press beginning in 1972. He is a member of GCIU Local 13N. He went on strike on July 13, 1995, and has not returned to work. He testified that he had picketed during the strike. By letter, dated September 27, 1995, he was informed that he was being discharged for spitting on and assaulting carriers at the Southfield Distribution Center on September 11, 1995.

Summerville has been employed as a paper and plate handler and truckdriver by the DNA since the JOA. He had previously worked for The Free Press since 1970. He is a member of GCIU Local 13N. He went on strike on July 13, 1995, and has not returned to work. He testified that he had picketed and done telephone solicitation during the strike. By letter, dated November 1, 1995, he was informed that he was

being discharged for assaulting a newspaper carrier at the Southfield Distribution Center on September 11, 1995.

Kelleher testified that he made the decisions to discharge Gavin and Summerville after reviewing a number of documents. The documents relating to Gavin were (1) a Strike Incident Report by Marvin Jackson describing an incident on September 11, 1995, in which, after his fiancee was spat upon while crossing the picket line at the Southfield Distribution Center, a picketer began to heckle him, threatened to kick his "ass," and struck him with a picket sign, and another picketer punched him in the back; (2) an unsworn affidavit of Desiree Wheeler, dated September 11, 1995, describing the incident on that date; (3) an unsworn affidavit of Desiree Wheeler, dated September 19, 1995, describing part of the same incident; (4) a statement of Desiree Wheeler, dated September 25, 1995, describing her identification of a photo of the person who spat on her; (5) a copy of the photo identification card of Camel Gavin; (6) an unsworn affidavit of Marvin Jackson, dated September 19, 1995, describing the September 11 incident; and (7) a Detroit Police Department report, dated September 11, 1995, concerning the arrests of Gavin and Summerville on that date. Based on the information in these documents, he concluded that Gavin had assaulted Jackson and that he should be discharged. In making his decision to discharge Summerville, he had available all of those documents, plus a copy of Summerville's photo identification card. He concluded that during the incident Summerville had come up behind Jackson and struck him in the back.

Jackson testified that, after picketer Terry Walkuski spat on Wheeler as they drove out of the facility, he backed up to the picket line, got out of his car, and spoke to Walkuski. As he did so another picketer, whom he identified from a photo at the hearing as Gavin, told him they got what they deserved,

came around the side of his car, and struck him with the stick of his picket sign. When Gavin came at him again, Jackson grabbed the stick, took it away, and began hitting him with it. As he was struggling with Gavin, Summerville, whom he also identified at the hearing from a photo, came up behind him and punched him. He turned around and took a couple of swipes at Summerville with the stick before the police intervened and arrested Gavin and Summerville.

Wheeler testified that after Jackson got out of their vehicle and was addressing Walkuski, Gavin approached him and hit him on the shoulder with a picket stick. After Jackson grabbed the stick from him and they began fighting, Summerville "snuck up behind and sucker-punched him in the back." Jackson turned, hit Summerville once with the stick, and the police broke up the fight.

Gavin testified that, after exiting the facility, Jackson backed up to the driveway with his tires squealing. He stopped about 8 to 10 feet from where Gavin was standing, got out, and started screaming at Gavin about someone spitting on his car and his fiancee and said he was going "to kick some ass." Gavin told him he did not spit on his car and told him "if you want to kick someone's ass, come and kick mine." Jackson came around the back of his car towards Gavin, who put his sign up in a defensive position because Jackson was in a rage. He said that he "pushed it forward to meet his force." Jackson took the sign out of his hands and tore it up. As he was doing so, the police came over and arrested Gavin. He said that he had not struck Jackson with the sign or with his hand. He testified that when Jackson was approaching him, Summerville came over to the driveway, but that he did not strike or touch him. Gavin said that he went to trial on a charge of felonious assault and was found not guilty. On cross-examination, Gavin admitted that at his

criminal trial he had said that when Jackson got out of his car he was yelling at 2 picketers at the far corner of the picket line, not at him. He also testified that after Jackson grabbed his sign away, he kicked at him but did not make any contact.

Summerville testified that Jackson backed his car up to about 30 feet from where he was sitting down, eating, and talking with other picketers. He didn't pay much attention to it until he heard voices getting louder. At that point, he walked over because he was concerned that Jackson might do some harm to his friend and fellow picketer, Gavin, whose voice he recognized. As he approached from behind with his picket sign out in front of him, Jackson turned, grabbed his sign, and tore the paper off. At that point, 2 police officers said to break it up and he and Gavin were arrested. He testified that he did not sucker-punch Jackson, that he did not see anyone hit him, and to his knowledge Jackson was never struck. He also did not see Jackson strike Gavin or himself. He was found not guilty of assault in a criminal trial.

Rahszene Griffin is a police officer with the Detroit Police Department, who was at the Southfield Distribution Center monitoring the picket line when this incident occurred. He testified that he observed Gavin strike Jackson's vehicle with a picket sign as it was leaving the location. Jackson pulled over without backing up, got out of his vehicle, and walked towards the rear. Gavin and Summerville approached him and Gavin struck Jackson in the chest with a picket sign, as Summerville held him from behind. Griffin and his partner ran over, stopped the confrontation, and placed Gavin and Summerville under arrest. He said that he was standing about 10 feet away and that he did not see Jackson strike Gavin or see him holding anything.

Analysis and Conclusions

I find that the Respondent has established that it had a good-faith belief that both Gavin and Summerville had been involved in an assault on Jackson on September 11, 1995, based on the statements of Jackson and Wheeler about what happened and the police report that indicated they had been arrested at the scene. This was serious misconduct under *Clear Pine Mouldings* and was grounds for discharge.[36]

I found the testimony of both Gavin and Summerville about this incident to be implausible and unconvincing. Both claim that no blows were actually struck by anyone during the entire altercation.[37] The testimony of both Jackson and Wheeler was believable and persuasive and I credit their versions of what occurred. Jackson did not deny or attempt to minimize the fact that he responded to being hit, by striking back. I find it likely that, to the limited extent that the details of their otherwise mutually corroborating accounts differ, it resulted from their differing perspectives during the course of the incident and the violent nature of the assaults on Jackson. Although Officer Griffin was presumably an unbiased observer, having heard his testimony and observed his demeanor, I am convinced he had no present recollection of what took place during the incident. However, nothing in his testimony detracts from that of Jackson and Wheeler or supports that of Gavin or Summerville.

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[36] I find that the Respondent has not established that it had any reason to believe that Gavin had spit on any carriers during the incident or had assaulted anyone other than Jackson.

[37] In Gavin's case, this was consistent with his testimony about Walkuski, that he "didn't see anyone do anything."

I find that the credited evidence establishes that, as Jackson's vehicle was exiting the facility, Walkuski spat on Wheeler through the window. When Jackson realized what had happened, he backed up to the picket line, got out, and spoke to Walkuski. Gavin, a bystander, interjected himself into their verbal confrontation, came at, and struck Jackson without provocation. Once Summerville, who was sitting some 30 feet away when the confrontation began, realized that Gavin was involved he went over to assist him. When Gavin and Jackson began exchanging blows, Summerville punched Jackson from behind and was in turn struck by Jackson. I find no evidence that anything Jackson said or did was so provocative or threatening as to justify Gavin's initially striking him. I do not credit Gavin's self-serving claim that he simply held his picket sign in a defensive position and did not strike Jackson. Although Jackson took the sign away from Gavin and struck him with it, from all that appears, he was acting in self-defense. Even if Summerville had been trying to extricate his friend from the predicament in which Gavin had put himself, his attack on Jackson from behind cannot be condoned on that basis. There were police officers nearby whose job it was to maintain order. There is nothing to suggest that, when he came up behind Jackson, Summerville was trying to break up the fight or act as a peacemaker. Rather, it appears that he sought to exacerbate the incident and further the assault on Jackson. I find that counsel for the General Counsel have not established that Gavin and Summerville did not engage in the misconduct for which they were discharged (assaulting Jackson) and have not

proved any violation of the Act.[38] I shall recommend that these allegations be dismissed.

12. Discharges of Daymon Hartley

Daymon Hartley has been employed by The Free Press as a staff photographer since September 1983. He is a member of the Guild. He went on strike on July 13, 1995, and has not returned to work. During the strike he engaged in picketing and has taken photographs for The Sunday Journal, a newspaper put out by strikers. By letter, dated September 24, 1996, he was informed that he was being discharged because of his conduct (1) on August 19, 1996, blocking ingress and egress at the North Plant with his vehicle and coercively photographing DNA personnel at that facility, and (2) on September 5, 1996, coercively videotaping cars attempting to enter the Hayes Distribution Center.[39]

Meriwether testified that he made the decision to discharge Hartley pursuant to the recommendations of Taylor, who had reviewed the evidence concerning those incidents.

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[38] The fact that both Gavin and Summerville may have been acquitted of criminal charges arising out of the incident is not conclusive in this matter given the different burden of proof involved in criminal matters.

[39] The September 24 letter also discharged Hartley for participating in the sit-down at the end of the rally at The News building on August 30, 1996. That discharge, a discharge for his participation in the demonstration at the Oakland bureau of The News on October 16, 1996, and another for his participation in the demonstration at the Riverfront plant on December 30, 1996, are discussed in the sections of this decision dealing with those incidents.

Taylor testified that he made those recommendations after reviewing videotapes of the incidents on August 19 and September 5, a conversation with investigator Jesse Bartlett, and some documents. The documents were (1) an injunction issued by the Macomb County Circuit Court on September 13, 1995, limiting picketing at the entrance to the driveway leading to the South gate of the North Plant and prohibiting the blocking of ingress and egress; and (2) an unsworn affidavit of Jesse Bartlett, dated September 9, 1996, stating that he had reviewed a videotape taken on August 19 which shows a gray Dodge pickup registered to Harley blocking the North gate at the North Plant and an individual he identified as Hartley photographing APT guards using a camera with a long range lens, and that he viewed a videotape of mass picketing at the Hayes Distribution Center on September 5 which shows the same gray pickup parked at that location. Based on this, he concluded that Hartley had blocked ingress and egress to the North Plant and had photographed security guards there on August 19. Based on his conversation with Bartlett, he understood that Hartley was the person who engaged in coercive videotaping during the Hayes incident. He recommended that Hartley be discharged for his misconduct during these incidents.

Hartley credibly testified that August 19 was a hot day and he went to the North Plant to deliver soft drinks to the picketers there. He parked his pickup near the driveway into the plant with its rear portion extending into one of the 4 lanes of the driveway for about 5 minutes while he distributed the drinks and talked to the picketers. When he saw someone videotaping them, he walked over and pretended to be taking a photograph, then, he got into his truck and drove away. He said that while he was there he saw several cars go through the entrance without difficulty.

The videotape shows the entrance at various times during the morning of August 19. It shows a few picketers patrolling and several vehicles, including large trucks, entering and leaving without difficulty. At 12:36 p.m. Hartley's vehicle is parked at the end of the driveway. It is clearly parked in the far right-hand lane that vehicles use to exit. It is also clear that there are at least two unobstructed lanes and that vehicles could easily and safely enter and leave the facility at the same time notwithstanding the presence of Hartley's vehicle. It also shows Hartley walk towards the videocamera and raise the camera that he was carrying as if to take a photograph. He then walks back to his vehicle gets in and drives away.

Analysis and Conclusions

I find that the Respondent has failed to establish that it had a good-faith belief that Harley had engaged in serious misconduct at the North Plant on August 19. Although the affidavit of Bartlett states that Hartley's pickup was "blocking the exit," he was not present and was merely stating what he purportedly saw when he viewed the videotape. Taylor, who made the recommendation to Meriwether which resulted in the discharge, had viewed the same videotape himself and could not have relied on Bartlett's misstatement of what it depicts. There is no evidence that anyone who was present during the incident gave a statement or had any input into the decision to terminate Hartley. The Respondent's officials simply looked at the videotape, saw what they wanted to see, and pronounced it serious misconduct. The videotape shows that for approximately 5 minutes, Hartley's pickup was parked in a position that partially obstructed one lane of a driveway that is at least three lanes wide or more. Not only does it not show any vehicle being prevented or even delayed in entering or leaving the facility, it clearly shows that the one vehicle that exited while the pickup was parked there had no

difficulty doing so. It is also clear that none of the picketers are patrolling in the driveway while the pickup is parked there or attempting to use it to interfere with ingress or egress. I find that under these circumstances, no reasonable person could conclude that Hartley was attempting to block the entrance by briefly parking his truck at the end of the driveway or that his doing so constituted serious misconduct which coerced or intimidated any employee exercising protected rights. He might have deserved a parking ticket, but not discharge.

Similarly, I find that the Respondent has failed to establish that it had a good-faith belief that Hartley's apparent photographing of the security guard was coercive or constituted serious misconduct. Taylor gave no explanation as to why he concluded it was coercive. There may well be circumstances under which photographing nonstriking employees crossing a picket line or while at work could be considered coercive but that is not what is involved here. Hartley was well-known to the Respondent as a professional photographer whose business is taking photographs. He was not one of those engaged in the picketing at the North Plant that day and he clearly was not surveilling nonstrikers. I find that under these circumstances his briefly pointing a camera at a security guard who was in turn pointing a videocamera at him did not reasonably tend to coerce or intimidate anyone. See *Wayne Stead Cadillac*, 303 NLRB 432, 436 (1991); *Georgia Kraft Co.*, 275 NLRB 636, 637 (1985). I also find that no reasonable person could conclude that Hartley had engaged in serious misconduct and that his discharge based on this incident was a violation of Section 8(a)(3) and (1).

At the hearing, Taylor testified that he has since learned that he was mistaken when he concluded that Hartley was the person who was allegedly coercively videotaping vehicles at

the Hayes Distribution Center on September 24, 1996. While the Respondent asserts that this was an honest mistake, the fact remains that he was wrongfully discharged for a strike-related incident. Consequently, I find that the Respondent's discharge of Hartley for this incident also violated the Act.

13. Discharge of Robert Heckart

Robert Heckart has been employed by the DNA as a pressman at the North Plant since the JOA. Before that he had worked for the Detroit News since July 1965. He is a member of GCIU Local 13N. He went on strike on July 13, 1995, and has not returned to work. By letter, dated September 27, 1995, he was informed that he had been discharged for throwing a brick and breaking the windshield of a bus carrying DNA employees at the North Plant on August 19, 1995.

Kelleher testified that he made the decision to discharge Heckart after reviewing a number of documents relating to the incident. The documents consisted of (1) a copy of Heckart's picture ID card; (2) an undated and unsigned L.S.S. Investigative Sheet containing a statement about the incident; (3) an unsworn affidavit of the busdriver Harry Bentz concerning his observations of the incident; (4) an invoice and an unsworn affidavit of the president of the bus company concerning the cost of repairs to the bus windshield; and (5) a report of the Sterling Heights Police Department concerning the incident which summarizes a statement by the busdriver about the incident, that of a passenger who suffered a possible eye injury from broken glass, and that of another passenger, Natasha Watkins, who said she saw a person throw a brick at the bus and who subsequently identified Heckart at the scene as the perpetrator. It also states that Heckart was arrested and charged with felonious assault and malicious destruction of

property over $100. Kelleher testified that, based on the information in these materials, he concluded that Heckart had thrown a brick or rock which broke the windshield of a bus being used to transport employees to and from the North Plant and could have caused serious injury.

Heckart testified that on August 19, 1995, he was doing picket duty at the center gate of the North Plant from 5 to 11 p.m. Between 10:30 and 11:00, he was among a group of 30 to 40 picketers on Mound Road. when he saw a bus pass by in the far left lane, 4 lanes from the curb on which he was standing. When the bus passed he heard a loud noise and commented on it to another picketer, Mike Lorentz. About a half-hour later, as he was preparing to leave the picket line at the end of his shift, he saw 2 police cars pull up and a police officer talking to Lorenz. He asked what the problem was and the police officer asked Heckart if he had been present when the bus went by. He said that he had been and the police officer told him to stand there. Another police car pulled up, a passenger side door was opened, and a spotlight was put on him and Lorentz. A police officer told him that he was accused of throwing a brick at the bus and that flying glass from a broken window had injured someone. He said that he had not done it and that they had the wrong person, but he was arrested and taken to the Sterling Heights police station. Pursuant to a plea agreement, he pled "no contest under advisement" to the criminal charge against him, which he understood to mean that if he did not appear before the judge again during the next year, "it would be like it never happened." He said that he did so on the advice of the lawyers who represented him because it was the cheapest way to go and he could not afford to hire his own lawyer. As a part of the plea agreement, he was also required to pay $430 to the bus company for the cost of the window, something he was not aware of until the day the plea was entered.

Analysis and Conclusions

I find there is sufficient evidence to establish that when Heckart was discharged the Respondent had a good-faith belief that he had been identified as the person who threw an object at the bus outside the North Plant on August 19, 1995, which constituted serious misconduct. There was evidence that an object had been thrown, breaking the windshield and injuring a passenger.[40] The Board has found similar misconduct to be grounds for discharge. See, e.g., *Mohawk Liqueur Co.*, supra; *GSM, Inc.*, 284 NLRB 174 (1987). The police report indicated that an eyewitness had positively identified Heckart at the scene of the incident as the person who threw a brick at the bus.

I also find that the General Counsel has established by a preponderance of the evidence that Heckart did not engage in the misconduct for which he was discharged. I base this finding on the fact that there is no evidence in the record which is sufficient to contradict or overcome Heckart's credible testimony that he did not throw whatever it was that damaged the bus that night. He was a persuasive witness and I believed his testimony that he did not and would not do such a thing.[41] First, there was testimony that Heckart has long

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[40] The evidence does not establish what actually struck the bus windshield. No brick or other object was recovered by the police who searched the scene.

[41] Heckart's testimony about his actions that night is corroborated by the testimony of Michael Lorentz who was picketing with him that night. Although, I did not believe Lorentz' testimony about another unrelated incident, discussed below, his testimony about this incident was credible, consistent with the evidence as a whole and essentially uncontradicted. It is well settled

suffered from an arthritic condition which the General Counsel contends prevented him from throwing anything the distance the object involved in the incident was thrown. Considering all of the testimony in the record about his physical condition and his performance of the duties of a pressman for many years, I find it is inconclusive and fails to establish that he was physically unable to have thrown an object at the bus. His physical condition notwithstanding, I find there is no reliable evidence that he did so.

As noted, the only basis for the police and the Respondent to conclude that Heckart was guilty of damaging the bus was the fact that he had allegedly been identified at the scene of the incident, 20 to 30 minutes later, by Natasha Watkins who was a passenger on the bus. It was clear that, at the time of the hearing, she had no idea who damaged the bus. Having considered her demeanor while testifying and her testimony as a whole, I also do not believe she had any idea who did it at the time of the incident.

At the hearing, Watkins' testimony failed to establish that it was Heckart who damaged the bus. On direct examination, she testified that on the night in question she was employed by the DNA as a platemaker and paperhandler. She was seated in the front seat of the bus when she saw "a guy that jumped out in front of the bus and threw a brick." The glass shattered and some fell on her leg. The driver turned the bus around and drove to where the police were located. The police came on the bus, asked her a few questions, including, if she could

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that failure to credit part of a witness' testimony does not preclude the trier of fact from crediting other parts of his testimony. E.g., *PBA, Inc.*, supra at 998 fn. 1; *Maxwell's Plum*, 265 NLRB 211, 216 fn. 14 (1981).

identify the person. She said that she could. She also testified that she was sure she identified the right person to the police.

On cross-examination, Watkins said that she was seated in the first aisle seat on the passenger side of the bus but that she did not recall if she was going to or from work when the incident occurred or how many people were on the bus. She said that she did not see what the object was that struck the bus but assumed that it was a brick. She also did not see the object strike the bus window. She said that she saw a group of about 10 people at the side of the road and that one of them, wearing blue jeans and a white shirt, stepped out and threw something. When asked if she could actually remember what the person was wearing, she responded that she could not. She testified that she talked to the police for 5 or 10 minutes before going with them to make the identification. She said that, of the group of 10 pickets she had seen, only 2 of them had on blue jeans. When they got to the scene the police pointed out to her two men in blue jeans, pointed a spotlight at them, and she identified one of them. On further cross-examination, when asked if the person had a mustache or a beard, she said she did not remember and that she identified the man "by clothing only." When asked if she would recognize the man if she was shown his picture, she said she would not. When asked if she could identify the person from picture ID cards in the record, she said "no, I only identified him by the clothing."

Sterling Heights police officer Jeffrey Milke testified that he was on duty near the North Plant that night and was informed by his command officer that a bus had been damaged while attempting to enter the plant. He was directed to drive a witness to the scene to identify the perpetrator. He drove Natasha Watkins to where a group of picketers were standing. When they arrived she made a positive identification

of a person in the group, while seated in his patrol car about 50 to 60 feet away. He did not recall if a spotlight was used. Watkins told him that she could identify the person, but she did not tell him she could only do so by his clothing.

Sterling Heights police officer Jimmy Fawaz testified that he was on duty near the North Plant that night and the bus drove up to where he was parked on the median strip of the road. The driver informed him that someone had thrown a brick or something at the bus which broke the windshield and injured a passenger. He talked with the driver, the injured party, and a witness who said that the person who threw the object was wearing blue jeans and that she could identify him. Fawaz and two other police officers went down to the gate and saw two individuals wearing blue jeans, one of whom was walking away and was told to remain. He asked all of those present if they had thrown a rock at the bus and all said "no." He radioed back to the officers near the bus and requested that they bring the witness up to identify the perpetrator. Fawaz testified that she was brought to the scene and, without any hesitancy, said "that's the one," meaning Heckart, whom he placed under arrest. He said Heckart denied any responsibility. On cross-examination, Fawaz testified that the witness was in a patrol car when she made the identification of Heckart and that he did not hear her speak, but was told what she had said by another officer. He testified that there were about 15 to 20 pickets present when the identification was made and that, according to his report, only 2 were wearing blue jeans. He did not know whether anyone had left the scene between the time of the incident and the time the identification was made. He could not recall what Heckart was wearing other than blue jeans. He testified that the witness did not tell him that she could not identify the person by his face or that she did not know what he looked like. Fawaz denied that anyone was singled out of the 15 or 20

persons at the scene of the identification and said that he did not remember a spotlight being used.

The evidence that Heckart was present in the general vicinity when the bus was damaged, without more, is insufficient to establish he engaged in misconduct. There must be reliable evidence identifying him as the perpetrator. See *General Telephone Co.*, supra at 739. There is none in this record. Watkins' testimony shows that she cannot currently identify Heckart or anyone else as the person who threw an object at the bus. Moreover, it establishes that even on the night of the incident she identified Heckart as the perpetrator, not from his individual physical characteristics or facial features, but because some of the clothing he was wearing (blue jeans) was similar to that worn by the person she saw throw an object. She did so only after Heckart and another individual wearing blue jeans had been spotlighted by the police.[42] Her identification did not take place until 15 or 20 minutes, or more, after the bus was struck, by which time, any number of blue jeans-clad individuals could have left the scene. Milke's testimony about the incident establishes only that Watkins told him she could identify the perpetrator and purportedly did so. She told him only that it was a white male. He did not know on what her alleged "positive" identification was based. Fawaz' hearsay testimony about the incident and the identification of Heckart adds nothing. He was not present or within earshot when Watkins made her identification and apparently never spoke to her directly about her identification of Heckart. He testified that he did not know it was based on clothing alone. In fact, if he had known, he

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[42] I credit the testimony of Watkins and Heckart that he was spotlighted over the lack of recollection of Officers Fawaz and Milke.

would not have arrested Heckart because, in his words, "what kind of arrest would that be . . . .? "

The fact that, as a part of a plea agreement, Heckart entered a plea of nolo contendere in the State criminal proceedings resulting from his arrest is not evidence that he was guilty of the charges asserted against him. See Fed.R.Evid. 410. It was neither an explicit nor implicit admission of guilt and cannot be used against him in subsequent litigation. E.g., *Clougherty Packing Co.*, supra at 1145; *Lichon v. American Universal Ins. Co.*, 459 N.W.2d 288 (Mich. 1990). Nor do I find that his plea or the fact that he paid restitution for damage to the bus undermines his credible testimony and consistent denial of responsibility for the incident. He testified that he did so on the advice of an attorney, apparently supplied by his Union, because he could not afford to hire an attorney on his own. Given that and his understanding that, if he did nothing to bring him back before the court for a year the conviction would be wiped out, his actions are not inconsistent with his denial of responsibility. Since I find that Heckart's credible testimony establishes that he did not engage in the misconduct for which he was discharged, the Respondent violated Section 8(a)(3) and (1) by discharging him. *GSM, Inc.*, supra; *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1477 (7th Cir. 1992).

14. Discharge of Scott Henderson

Scott Henderson has been employed by the DNA since the JOA as a relief district manager. He had previously been employed by the Free Press, beginning in September 1984. He is a member of Teamsters Local 372. He went on strike on July 13, 1995, and has not returned to work. By letter, dated November 16, 1995, he was informed that he was being discharged for striking a vehicle with a picket sign and

causing damage to its paint at the Ann Arbor Distribution Center on August 15, 1995.

Kelleher testified that he made the decision to discharge Henderson after reviewing documents relating to the August 15, 1995 incident. The documents were (1) an unsworn affidavit of Joseph Piazza, dated September 12 and 15, 1995; (2) a DNA Incident Report, dated August 15, 1995; (3) a copy of Henderson's photo identification card; (4) an Ann Arbor Police Department report, dated August 15, 1995; and (4) an Ann Arbor Police Department report, dated August 16, 1995. Based on the information in these documents, he concluded that, as Glenda and Joseph Piazza were exiting the Ann Arbor Distribution Center, Henderson struck the rear quarter panel of their car causing damage to the paint.

Henderson testified that on the morning of August 15, he was among five or six pickets at the entrance to the Ann Arbor Distribution Center. He and others were carrying picket signs, cardboard signs stapled to a piece of wood. At about 1 a.m., a car drove by the picket line at a fairly rapid speed and squealed its tires as it turned onto the street. He was the only picket standing on the driver's side and was 5 feet from the car when it passed. After going about 40 to 50 feet, the car stopped and the driver yelled towards the pickets, "You son of a bitch, you hit my car." The car returned to the facility and the driver went into the building. He said that he had seen the driver before and that she made comments to the pickets almost daily. About a half hour later, a police car entered the facility. About 10 to 15 minutes after that, the police car came to the picket line with the driver of the car inside and she pointed out the window. The police came back to the picket line, handcuffed him and took him away. He said that he was not arrested but was told he was a suspect. He was not prosecuted as a result of this incident. Henderson

said that he did not strike the car with a picket sign that night and did not hear the sound of anything striking the car as it exited.

Joseph Piazza testified that he had delivered newspapers for the DNA with his sister-in-law, Glenda Piazza, since before the strike, but has not done so for the last 2 years. On the night of August 15, 1995, he was riding in Glenda's car when it exited the Ann Arbor Distribution Center after picking up newspapers. As they crossed the picket line at about 5 or 10 miles per hour, he was facing to the rear, looking out the window and saw a striker lunge at the vehicle and hit it with his sign on the side rear quarter panel and the trunk lid. They returned to the facility and reported the incident to the district manager. After the incident, he saw scratches on the rear quarter panel and the trunk lid that had not been there before. He was familiar with the car because he had done maintenance work on it. When the police came to the scene, he pointed out the man who had struck the car from among the picketers and he was "sure it was him." At the hearing, Piazza identified Henderson as the perpetrator from his photo identification card in the record.

Kevin Harding is a patrol officer with the Ann Arbor Police Department. He testified that on the night of this incident he was dispatched to the scene on a malicious destruction of property complaint. Upon arrival, he spoke with Glenda and Joe Piazza who told him that a picket had struck and scratched their vehicle with a sign he was carrying. He observed what appeared to be a fresh scratch in the area of the vehicle they described. He asked the Piazzas to identify the perpetrator and both directed him to a person standing about 50 yards away, who was subsequently identified as Henderson. As he approached the group of pickets, they began to move about and exchange the signs they were

carrying with one another. He was able to examine only two of the signs and saw nothing that indicated they did the damage to the vehicle. He placed Henderson under arrest and took him to the police station. Henderson said only that he "did not do anything" and they had no further conversation.

Analysis and Conclusions

I find that Henderson was on strike at the time of the incident for which he was discharged, that it took place at a picket line, and that the Respondent considered him to be striker. I also find that the Respondent has established that it had a good-faith belief that Henderson had struck and damaged a newspaper carrier's vehicle as it exited the Ann Arbor facility and crossed the picket line. Damaging a vehicle crossing a picket line constitutes serious misconduct and is grounds for discharge. E.g., *Mohawk Liqueur Co., supra; GSM, Inc.*, supra.

I found Piazza to be a believable witness and credit his testimony about this incident.[43] He no longer delivers newspapers for the Respondent and he showed no evidence of bias one way or the other. Nothing in his demeanor or the evidence as a whole served to discredit him. Although he acknowledged that he does not read or write well, there is no reason to believe this had any effect on his ability to observe or to recall what he observed that night. On the other hand, there was nothing about Henderson's demeanor that indicated

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[43] Glenda Piazza was not called as a witness. I give no weight to the hearsay evidence in the record that she identified Henderson as the perpetrator on the night of the incident. I find that Joseph Piazza's credible testimony standing alone is sufficient to counter Henderson's denial of responsibility.

he was not being truthful. The testimony of Reinaldo Ramos did little to support Henderson's version. Ramos, who is also an alleged discriminatee in this matter, testified that he had served as a picket captain at the Ann Arbor facility and that he was present when this incident occurred. He said he did not see Henderson do anything to the vehicle. However, few of the details Ramos claimed to recall about the incident matched those to which Henderson testified. Most important, he testified that he was on the driver's side of the vehicle when it passed him and that Henderson was on the passenger side while Henderson testified that he was on the driver's side. I do not credit Ramos' testimony about this incident. Another striker, Paul Bonomo, testified that he was on the driver's side of the vehicle and thought Henderson was also. He said that he did not see him strike the vehicle, but he also claimed that they had to jump out of its path and that it may have brushed them. He did not appear to have a clear recollection of the incident.

I find that the testimony of Henderson and Bonomo does not outweigh the credited testimony of Piazza as to what occurred that night. Accordingly, I find that the General Counsel has not established by a preponderance of the evidence that Henderson did not engage in the misconduct for which he was discharged and has not proved that his discharge was a violation of the Act.[44] I shall recommend that this allegation be dismissed.

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[44] Based on the fact that the credible testimony of Piazza establishes that the vehicle was scratched by Henderson's sign, I find that this case differs from *Medite of New Mexico, Inc.*, supra, in which the Board found that strikers who struck a car with cardboard picket signs as it crossed a picket line, but did no damage to the vehicle, did not engage in misconduct serious enough to deny them the protection of the Act.

15. Suspension and Discharge of Francis Hopkins

Francis Hopkins began working for The News as a reporter in March 1994. He is a member of the Newspaper Guild. He went on strike on July 13, 1995, and has not returned to work. He testified that he distributed The Sunday Journal and picketed at The News building during the strike. By letter, dated September 29, 1995, he was informed that he was being given a 5-day suspension for using threatening and abusive language to customers and employees entering and leaving The News building on various dates in August and September 1995. By letter, dated December 20, 1995, he was informed that he was being discharged for shoving a DNA employee as he was entering The News building on November 15, 1995.

Giles testified that he made the decisions to suspend and discharge Hopkins after reviewing certain documents. The documents relating to the suspension were (1) an unsworn affidavit of Frank Carmisino, dated September 14, 1995, concerning an incident on August 31, 1995, in which, as he was entering The News building, Hopkins called him names, threatened to kick his "ass," and after he returned to the building to talk to Security, Hopkins led a crowd that taunted him to come out and fight; (2) an undated statement by Frank Carmisino describing the incident on August 31, 1995; (3) an unsworn affidavit of Deborah Allen, dated August 31, 1995, concerning an incident on August 30, 1995, in which as she entered the garage at The News building, a person later identified to her as Hopkins, came up to her and called her a "bitch" and "fucking low-life;" (4) a memo for Judy Diebolt to John Taylor, dated September 11, 1995, concerning a complaint by Lillian Holland that she was twice verbally abused by Hopkins when she came to the lobby of The News building to pay her bill; (5) a sworn affidavit of Lillian

Holland concerning an incident on September 12, 1995, in which she was followed and verbally harassed by a crowd of about 10 people, including Hopkins, who called her vulgar names; and (6) a copy of the photo identification card of Francis Hopkins. The document relating to the discharge was an unsworn affidavit of Tony Manns, dated November 20, 1995, concerning an incident on November 15, 1995, in which Hopkins shoved him in the back as he was entering the executive garage at The News building. Giles testified that, with respect to the incidents leading to the suspension, he concluded that Hopkins had used threatening and abusive language to customers who came to the building to pay a bill or transact business and that his language and behavior was beyond the bounds of appropriate free speech. He concluded, on the basis of the affidavit of Manns, that Hopkins had shoved him and that he considered this to be battery for which he should be discharged.

Hopkins testified that when he got the suspension notice he did not know to what the allegations that he used abusive and threatening language related. On cross-examination he said that when he picketed he encouraged replacement workers not to replace strikers. He said that he had used the terms "motherfucker" and "dumb ass," but that he did not threaten to kick anybody's "ass." He said that "motherfucking asshole" was not a term he would use. On redirect, he said that he sometimes used profanity on the picket line in response to what people said to him. Hopkins testified that on November 15, 1995, he was picketing at The News building near a picket named "Donna." A male and a female exited the garage on Third St. and Donna called the male by name and asked why he was working as a "scab." She continued talking to the man, who began to argue with her and call her "a bitch." The man turned towards Donna and began to move towards her with clenched fists. Hopkins called the man an

"asshole" and told him if he wanted to fight, to fight a man. The man began to move quickly towards him with clenched fists but pickets stepped between them and security guards came out and escorted the man inside the building. Hopkins said he was 15 to 20 yards from the man when he moved towards Donna and that he never got closer than 20 feet from him. He said that he did not touch the man or have any contact with him and that he did not shove him or cause him to lurch forward into another person.

Deborah Allen testified that on August 30, 1995, she was employed by the DNA as a stockroom coordinator and had continued to work after the strike began. As she was going to work that morning, about 9:55, a man with a picket sign on his shoulder approached her and asked if she was proud of herself for helping to break the unions. She waved her hand at him and said, "yes, I am." The man called her a "bitch," and a "fucking low-life" in a loud, angry voice. She identified the man as Hopkins from a photo identification card in the record at the hearing.

Lillian Holland testified that on September 12, 1995, she went to The News building to pay for her newspaper subscription. There were people outside cursing and calling her names. After paying her bill, she went out and people were still heckling her, "they were saying motherfucker and talking about your mother and bitch and why are you going in there and all that kind of language." People inside the building asked her to come back in and point out the people who were heckling and harassing her. She pointed out 2 persons to them and they were taking pictures. A woman came and took a statement from her and she left with a security escort. She identified Hopkins from a photo in the record as the one that was cursing at her and saying "motherfucker," "bitch," and "whore." Judy Diebolt testified

that she is a city editor for The News and that she knows Hopkins from when he worked there as a reporter. On or about September 11, 1995, she was called to the lobby to meet with Lillian Holland, a customer who was offended by remarks made to her by a man she pointed out and Diebolt knew to be Hopkins.

Frank Carmisino testified that on August 31, 1995, he went to The News building to place an ad. As he reached the front entrance, a person he later learned was Hopkins started calling him names and asked if he knew they were on strike. Carmisino responded that he did, but that he needed to place ads for his business. Hopkins began swearing at him as he entered the building. While he was inside, through the windows he saw a crowd gathering and pointing at him. When he exited, a heated argument started and they were swearing and trying to provoke a fight. He went back inside, filed a complaint with security, and identified a picture of the man who had yelled at him, calling him a "motherfucker," an "asshole," and threatened to kick his "ass." Carmisino identified Hopkins from a photo in the record at the hearing as the person who made these remarks to him.

Anthony Manns is employed by the DNA as a customer service agent. He testified that on November 15, 1995, he and a coworker, Yolanda Patton, walked to the parking lot to move her car closer to The News building. They went out through the executive garage and there were about 15 to 18 strikers around the door. One of the strikers he knew as Donna Alexander had a megaphone and "was saying some nasty things" to them as they passed. He smacked down the megaphone Alexander had in her hand when she moved it so close to him it would otherwise have hit him. They proceeded across the street and Alexander continued to call them names. After driving to a closer lot, they walked back to the door

where Alexander and others were yelling at them. They said nothing to the picketers and Patton preceded him through the door. As he entered, he saw someone in his peripheral vision who came from behind him and pushed him with two hands in the lower back with such force that he bumped into Alexander. He turned around and saw Hopkins who said, "come on" to him over and over. A security guard pulled him inside and closed the door. He went to his supervisor and reported the incident. At the hearing, he identified a photo of Hopkins as the person who pushed him and challenged him. Manns testified that he only spoke to Alexander when he pushed the megaphone away and said only "this is not necessary." He denied calling her a "bitch" or any other names and said he had not spoken to Hopkins before he was pushed in the back.

Yolanda Patton is employed by the DNA as a finance clerk. She testified that on November 15, 1995, she and Manns went to a parking lot to move her car closer to the building. As they went out, there were a lot of strikers there who were calling them names. When they returned, Manns was shoved up against her and when she turned around and the only person she saw was Hopkins. She said that she did not recall if Manns had said anything to the strikers as they walked out or when they returned to the building. She identified a photo of Hopkins as the person she had seen immediately after Manns bumped into her.

Analysis and Conclusions

I find that the Respondent has established that it had a good-faith belief that Hopkins had made abusive remarks to employees and customers during August and September 1995 and that he made a threatening remark to Carmisino on August 31, 1995, based on the written statements that Giles

reviewed. Under Board law, the abusive and profane remarks it believed that Hopkins made to Allen, Carmisino, and Holland did not constitute serious misconduct warranting disciplinary action. See, e.g., *Nickell Moulding*, supra; *Wayne Stead Cadillac*, supra; *Calliope Designs*, supra. However, I find that his threatening remark to Carmisino as he left The News building, was coercive and did constitute serious misconduct under Clear Pine Mouldings. After Carmisino entered the building, Hopkins led a crowd of pickets who taunted him while he was inside. When he left the building, Hopkins was standing among the group and threatened to kick his "ass," causing him to retreat inside. Considering all of the circumstances, I find that, under an objective standard, that threat was likely to cause a reasonable person to feel coerced and intimidated. Based on the statement of Manns which Giles reviewed, I find that the Respondent had a good-faith belief that Hopkins had assaulted Manns by pushing him in the back on November 15, 1995. This was serious misconduct, likely to coerce and intimidate an employee, and warranted discharge under *Clear Pine Mouldings*.

Carmisino was a credible witness and I find no reason to doubt his testimony about what occurred on August 31, 1995, or that Hopkins threatened to kick his "ass." There is no evidence to the contrary except for Hopkins' self-serving general denial that he had ever threatened to kick anybody's "ass" while picketing. I also find that under all the circumstances Hopkins' threat was coercive. As for the November 15, 1995 incident, I found Manns' testimony as to the substance of the incident to be credible and supported by the credible testimony of Patton. I did not entirely believe his claim that he said or did nothing to Alexander or Hopkins that might have incited them. Particularly, since in his testimony he took pains establish that while in the car he had counseled Patton to say nothing to the pickets when they returned to the

building, but Patton could not recall if he had said anything to the pickets or not. On the other hand, while I credit Hopkins' testimony that there was some interaction between "Donna" and Manns during the incident, I did not believe his self-serving testimony that he did not push Manns or come within 20 feet of him. There were numerous pickets present at the scene, but no one was called corroborate Hopkins' version of the incident. Moreover, even if Manns had made the comments Hopkins attributed to him and had come towards him in a threatening manner, once he stopped and turned to go inside there was no excuse for Hopkins' assault on him from behind. I find that counsel for the General Counsel have not established that Hopkins did not threaten Carmisino on August 31, 1995 or that he did not assault Manns without provocation on November 15, 1995. Therefore, they have not proved that the disciplinary action taken against Hopkins for either incident was a violation of the Act. However, as is discussed below, I do find that the discharge of Hopkins was discriminatory and violated Section 8(a)(3) and (1) because he was treated in a disparate manner by The News by virtue of the fact that non-striking employee Susan Stark was not discharged for similar misconduct that was at least as serious or more so than that of Hopkins.

16. Discharge of Allan Lengel

Allan Lengel has been employed by The News as a reporter since September 1984.[45] He is a member of the Guild. He went on strike on July 13, 1995, and has not returned to work at The News. During the strike, he engaged

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[45] The complaint and the exhibits referring to Lengel indicate that his first name is spelled "Allan," notwithstanding the fact that the transcript of his testimony shows him spelling it "Allen."

in picketing at The News building and wrote for The Sunday *Journal*. By letter, dated July 31, 1996, he was informed that he was being discharged because during the past several months he had restrained and coerced employees by conduct including, but not limited to, using a bullhorn to yell directly into the ear of an employee at a close distance.[46]

Giles testified that he made the decision to discharge Lengel based on the picket line conduct referred to in the letter of July 31, 1996, after reviewing certain documents. They were (1) a copy of the photo identification card of Allan Lengel; (2) a statement by Tracy Pipp that on May 6, 1996 a picketer photographed her while she was in the executive garage of The News building, waiting to be picked up after work, and the same person followed her to the car using a bullhorn which was close to her ear, calling her "scab," bitch," and "whore;" (3) an unsworn affidavit by Tracy Pipp, dated May 29, 1996, stating that on May 22, 1996, as she was entering The News building, a picketer, identified to her by coworkers as Allan Lengel, using a bullhorn, called her "a fucking scab" and said "I know where you live, bitch;" (4) a statement by Tracy Pipp, dated June 27, 1996, that as she entered the executive garage Lengel repeatedly called her "a scab" and "a whore;" (5) a statement by Tracy Pipp, dated July 30, 1996, that on July 29, 1996, Lengel followed her to the car repeatedly yelling at her through a bullhorn into her right ear which caused painful ringing for about 15 minutes after the incident; (6) a statement by Margaret Colborn that as she entered The News building on May 22, 1996, Lengel called her "a fucking piece of shit" and she called him "scum" and on May 29, 1996, Lengel said "That's right, just

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[46] Lengel's three other discharges are discussed in the sections of this decision dealing with those specific incidents.

walk your little ass in the front door;" (7) an unsworn affidavit by Belinda Lewis Gilboard, dated July 10, 1996, stating that during the last month Lengel has verbally abused her using sexually-oriented comments; and (8) an unsworn affidavit by Belinda Lewis Gilboard stating that, on July 10, 1996, in connection with her complaint concerning harassment she identified Lengel from pictures shown her by an investigator. Giles said the was also aware of the NLRB Order prohibiting strikers from intimidating and coercing employees and from using sexist or racial epithets. He concluded that Lengel was guilty of a pattern of sexist language towards employees and had assaulted Tracy Pipp by using an amplifying sound device held close to her ear which affected her hearing and that he should be discharged.

Belinda Lewis Gilboard testified that she is employed by the DNA as a production coordinator and works in The News building. She came to know Lengel as the result of verbal abuse he directed towards her during the period from February to July 1996. She said that every day she arrived at work Lengel would use his bullhorn to call her "a fucking scab" and ask her, "How does it feel to blow Pat Izzo?," a reference to her boss. At the hearing, she identified a photograph of Lengel as the person who repeatedly said this to her.

Tracy Pipp has been employed by The News since September 1995. She testified that several times, while she was waiting inside the garage for her ride, Lengel had taken her photograph and using a bullhorn had called her "a fucking scab," "a fucking whore," and "a bitch." On May 22, 1996, while entering The News building, she passed Lengel who followed behind her calling her "a fucking scab" and "a fucking whore" and said "I know where you live." On July 29, 1996, Lengel followed her to the car yelling in her ear

with his bullhorn, which caused a painful ringing in her ear that lasted 15 to 20 minutes.[47]

Lengel testified that throughout the strike he had carried a battery-operated megaphone while picketing and that he has used it to amplify his voice when speaking to persons crossing the picket line. He described it as "annoying" but not causing pain. He said that he had used the megaphone when speaking to Tracy Pipp, calling her a scab and saying she was "an expert on sheet metal," a mocking reference to something written about her in an employee newsletter when she started working at The News. He said that on one occasion he had followed her for about 10 feet from the garage to a car, walking within 2 or 3 feet of her and calling her "a scab," but did not call her any other names. He specifically denied calling Pipp "a whore" or "a bitch" and said he did not recall anyone else doing so. He also denied telling Pipp that he knew where she lived. He said he does not know Gilboard and denied saying to anyone, "How does it feel to blow Pat Izzo?" He said that on a date he could not recall he had an exchange with Marge Colborn in which he called her "a fucking piece of shit" and she called him "scum."

Analysis and Conclusions

I find that the Respondent has established that it had a good-faith belief that Lengel had engaged in serious misconduct warranting discharge based on the statement of

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[47] Although the record contains evidence concerning alleged racial slurs by Lengel directed at nonstriking employee Edward Cardenas in July 1996. There is no evidence that it was considered by Giles in making his decision to discharge Lengel; consequently, I have considered it only insofar as it bears on Lengel's credibility.

Pipp that his yelling into her ear with a megaphone caused her physical harm and that of Gilboard that Lengel repeatedly made sexually derogatory remarks to and about her as she crossed the picket line.

I found Pipp and Gilboard to be impressive witnesses who gave detailed and credible accounts of their encounters with Lengel. I credit their testimony over Lengel's self-serving denials and find that he made the comments they attributed to him. I also find that Lengel's use of the megaphone to yell in Pipp's ear on July 29, 1996, caused her physical harm. The effects caused by the volume of the megaphone to Pipp, a painful ringing sensation lasting 15 to 20 minutes, were no less harmful and no less coercive and/or intimidating than being struck or spat upon and should be treated the same way. Moreover, even if Pipp was fortunate enough to have suffered only temporary discomfort, there was a possibility of serious damage to her hearing. I find that this constituted serious misconduct. *New Galax Mirror Corp.*, 273 NLRB 1232, 1233 (1984). Cf. *Culinary Workers Local 226 (Casino Royale, Inc.)*, 323 NLRB 148, 161-162 (1997).

I find that Lengel repeatedly made sexually derogatory comments to Gilboard as she entered the building to go to work. They were offensive and reprehensible but did not involve any overt threat. In many cases, utterances of this kind have been found to not constitute serious misconduct. See, e.g., *Nickell Moulding*, supra; *Calliope Designs*, supra.[48] However, I find that Lengel's comments to Gilboard, which he publicly shouted at her on a daily basis for several months should be treated differently. It is one thing to act on the spur

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[48] I find that Lengel's exchange with Colborn falls into this category.

of the moment and shout an obscenity or derogatory remark. It is something quite different to single out an individual nonstriker and subject her to a daily tirade of sexually-oriented and slanderous verbal abuse. I find that, under an objective standard, repeated abusive and demeaning sexual remarks of the kind Lengel directed at Gilboard would tend to coerce and intimidate employees exercising their protected right to refrain from striking.[49] The malicious use of ridicule and scorn impacts directly on a person's sensibilities and makes one likely to avoid becoming the target of such abuse. When that abuse results directly from engaging in activities protected by the Act, it interferes with and restrains the exercise of those rights. Cf. *Romal Iron Works Corp.*, 285 NLRB 1178, 1182 (1987); *F.W.I.L. Lundy Restaurant, Inc.*, 248 NLRB 415, 422-423 (1980). The epithets that Lengel directed at Pipp were somewhat similar in content if not as openly slanderous. They were also part of a pattern of harassment and abuse, directed at her personally, and during which he at least once stated that he knew where she lived. I find that this, coupled with his photographing Pipp and making references to personal details about her, implied a threat of physical harm that constituted serious misconduct. Based on the foregoing, I find that counsel for the General Counsel have not established that Lengel did not engage in the misconduct directed at Gilboard and Pipp for which he was discharged or that it was not serious enough to warrant discharge and have not proved a violation of the Act. I shall recommend that these allegations be dismissed.

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[49] The fact that Gilboard continued to appear for work and to endure this abuse is not determinative. Applying an objective standard, I find it likely that few other female workers would demonstrate her strength or be willing to continually undergo such public humiliation.

17. Discharge of Ronald Lock

Ronald Lock has been employed by the DNA as a mailer at the North Plant since the JOA. He was previously employed by The Free Press. He is a member of Teamsters Local 2040. He went on strike on July 13, 1995, and has not returned to work. He testified that he did picketing and leafleting during the strike. By letter, dated September 18, 1996, he was informed that he was being discharged for malicious destruction of property and for threatening, spitting on, and making sexually offensive remarks to a DNA employee performing his job at the Trade Vine Party Store on Ford Road in Westland, Michigan, on June 15, 1996.

Kelleher testified that he made the decision to discharge Lock after reviewing a number of documents. The documents were (1) a copy of Lock's photo identification card; (2) a DNA incident report, dated June 16, 1996, by Richard Grabowski describing an incident on June 15, 1996, at 33600 Ford Road., in which a person who said he was a former DNA employee accosted him, accused him of stealing his job, threatened to kill him and kick his "ass," called him names, scratched his van and broke the glass in its mirror, some of which went into his face, and identifying the license plate of the person's pickup as WD7285; (3) an unsworn affidavit of Richard Grabowski, dated August 13, 1996, describing the incident which occurred at 9:05 p.m. on June 15, 1996, at the Trade Vine Party Store and identifying a photo of Ronald Lock as the person who spit on him and damaged his vehicle; (4) a City of Westland Police report concerning the incident which states that the suspect's vehicle was a light green, 1993 Ford pickup, with license number WD7285 and that the suspect was described as 24 to 27 years old, 5 feet 8 inches, with medium length sandy brown hair and a mustache; and (5) a DNA fleet operations report indicating the cost of

repairs to Grabowski's van to be $280. Based on the information in the information in these documents, Kelleher concluded that while delivering newspapers Grabowski had been accosted by Lock who threatened and made derogatory remarks to him, that Lock damaged the DNA vehicle by scratching it and breaking the rearview mirror, and that he should be terminated.

Richard Grabowski, the victim of the incident on June 15, 1996, was called as a witness by the Respondent. He initially refused to testify about it, invoking the Fifth Amendment privilege against self-incrimination. It became apparent that he had no fear of incrimination but was simply hesitant to testify because he is now a member of Teamsters Local 299 and was "just [being] loyal to my Brotherhood of Teamsters." Based on this, over the objection of the General Counsel, I permitted the Respondent's counsel to examine Grabowski as a hostile witness pursuant to Rule 611(c), Fed.R.Evid. Grabowski reluctantly testified as follows. He was driving a DNA van on June 15, 1996. At the Trade Vine Party Store, he encountered a person who broke the side mirror on his van, spit on him (possibly inadvertently), called him "a motherfucker" (which is common in the workplace), asked him to get out of his van, and threatened to kick his "ass" (possibly not meaning it). He testified that when he was shown Lock's picture, by a DNA investigator, to identify him as the assailant, he was reluctant to do so but was assured that "this was the man they were after." He did not recall talking to the police about the incident. He testified that during the incident he focussed on getting the license number of the assailant's vehicle, not the person who was driving (and when he was writing it down he probably misremembered it). He said that when he later appeared in court in connection with this incident, he told the DNA investigator that he was not positive that he had identified the correct individual and that

he wanted to drop the whole thing. He said he was fired by the DNA that same day.

Michael Willard is a police officer with the City of Westland Police Department. He testified that on June 15, 1996, he was dispatched to the Trade Vine Party Store and spoke to Grabowski who told him his van had been attacked. He inspected the vehicle and saw some scratches on the driver's side front fender and that the van's side door mirror was shattered and there were pieces of glass on the pavement beneath it. Grabowski described the assailant's vehicle and license number. He testified that Grabowski did not appear unsure about any of the information he provided. John Handzlik is a detective sergeant with the City of Westland Police Department who was assigned to investigate the incident. He ran a check on the vehicle that had been described and contacted Lock who was the registered owner. When Lock returned his phone call, he advised him of the investigation and Lock went into a tirade about the scabs that had taken his job, forced him to live on $100 a week, and caused his health to deteriorate. Lock initially told him that he had been in the hospital at the time of the incident and he was asked to provide documentation of his hospitalization. Thereafter, Lock brought in some materials from the hospital that showed he had been discharged before the incident, but he said that he was at a barbecue at a friend's house and provided the names of 8 people who could confirm that. Lock did not mention having left the house at any time and said that he had fallen asleep and had not left until around 3 or 4 a.m. He testified that there was no criminal trial because Lock had pled nolo contendere to the charges arising out of the incident.

Lock testified that he was not at the Trade Vine Party Store at any time on June 15, 1996. He has not been there

since the day after the strike started because he noticed it was selling The News and The Free Press. He said that he started June 15 in the hospital where he was treated for weight-loss, weakness, and internal bleeding. He went home and slept until noon, then went to the home of a friend, Ronald Maison, where he spent the afternoon and evening until about 11:30 p.m. The only time he left was around 8 p.m. when he and Maison drove to a grocery store in the latter's car to pick up some things for dinner. They were gone about 15 to 20 minutes. At around 9:30 p.m., he called a friend from Maison's home to let him know how he was feeling. He testified that he is 5 feet 10 inches, weighs 170 pounds, has dark brown hair, has not had a mustache since well before the strike started, and was 29 years old in June 1996.

Ronald Maison testified that he has known Lock for about 20 years and that he is a pretty good friend of his. He said that Lock was at his home from about 3 p.m. until he left for work at 11:30 p.m., except for a 15-minute trip they made to a grocery store about 8 p.m. Maison, his son, and Lock drove to the store in Lock's pickup. He said that Lock had not been out of his sight for more than a few minutes while at his home throughout the day. He said that they had not gone to the Trade Vine Party Store and that there had been no need for Lock to do so. He identified a copy of his telephone bill covering June 15, 1996, and testified that a toll call appearing thereon at 9:37 p.m. had been made by Lock. He said he did not remember Lock saying anything about being in the hospital that day or saying he did not feel well. Maison testified that they began to eat dinner at a few minutes before 9 p.m.

Analysis and Conclusions

I find that the Respondent has established that it had a

good-faith belief that Lock was the person who assaulted Grabowski, threatened him with physical harm, and damaged the DNA van he was driving on the night of June 15, 1996, based on the Grabowski's statements and the police reports identifying the perpetrator's vehicle as belonging to Lock. The assault, threat, and damage to the van were coercive and intimidating under an objective standard. They constituted serious misconduct and were grounds for discharge under *Clear Pine Mouldings*.

There is uncontradicted evidence that, on June 15, 1996, Grabowski was assaulted and threatened by a person who also damaged the DNA van he was driving. The issue is the identity of that person. There is no direct evidence in this record as to who that person was inasmuch as, at the hearing, Grabowski did not identify Lock as the perpetrator and sought to repudiate his previously having done so to the DNA investigator who took his statement. Grabowski's physical description of the perpetrator neither excludes nor pinpoints Lock.[50] However, there is, strong circumstantial evidence identifying the perpetrator, in that Grabowski's description of the make, color, and license plate of the perpetrator's vehicle establishes that it was Lock's.

Standing alone, I would not find Lock's self-serving denial that he was involved in the incident to be persuasive evidence. The only nontestimonial evidence that Lock was at Maison's house after 9 p.m. is a telephone bill that shows a toll call being made from Maison's house at 9:37 p.m. Lock said he called a friend, Gary Zerilli, to tell him how he was feeling. Although Maison confirmed this, there is no objective

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[50] Lock testified that in June 1996, he had lost nearly 30 pounds and weighed about 145.

evidence as to whom the number belongs. Zerilli was not called as a witness to confirm that Lock called him. Moreover, even if Lock made the call, it does not establish that he was not at the Trade Vine Party Store when the incident occurred. It was around 9 p.m. and Maison's house is no more than 10 minutes away. There is also the testimony of Maison that Lock was at his home eating dinner at the time of the incident. Although the parts of their stories essential to provide Lock with an alibi generally agree, the details of what transpired that day do not. Both testified that Lock was at Maison's house for much of the day, that Lock was there eating dinner at 9 p.m., that he only left the house once, around 8 p.m., to accompany Maison to the grocery store, and that Lock made a toll call at 9:37 p.m. But, according to Lock, he was so ill early that day he was hospitalized and was so weak that he did nothing but lay by the pool all day. Maison testified that Lock had come over to help him move some furniture. It never got moved but not because of Lock's physical condition. Maison testified that he did not know that Lock was sick despite the fact that Lock says he made several telephone calls from Maison's house, including to Zerilli, to tell people how he was feeling. Lock says he arrived at Maison's house at 1 p.m., but Maison said Lock was waiting outside for him when he got home at around 3:30 p.m. According to Lock, when they went to the grocery store they went in Maison's car and he did not use his truck at any time before leaving for home. Maison was sure that they went in Lock's pickup because it was parked in the driveway behind his car. While not conclusive, I find that these inconsistencies cast doubt on the story as a whole and, in turn, on Maison's veracity and/or recollection.

Considering all of the evidence, I do not credit Maison. It appears that he tailored his testimony to provide his friend with an alibi. He said that the barbecue was to start at 6 p.m.,

but that they did not sit down to dinner until around 9 p.m., just before the incident at the Trade Vine took place. His explanation for the delay, that chicken takes a long time to cook and there was not enough food for all the people who showed up, resulting in his having to go to the grocery store for more food, does not add up. The only unexpected diners were Maison's 2 children, who made a total of 6 instead of 4, and they went to the store for milk, butter, and possibly biscuits, not for more chicken. In any event, the trip to the grocery store was around 8 p.m. and took less than 20 minutes. Maison's testimony failed to convince me that it took 3 hours to get dinner on the table or that Lock was eating dinner with him at 9 p.m. Considering this and the evidence that Lock's pickup truck was at the Trade Vine Party Store at 9 p.m. that night, I find I that the General Counsel has not established by a preponderance of the evidence that Lock did not engage in the misconduct for which he was discharged and have not proved a violation of the Act.[51] I shall recommend that this allegation be dismissed.

18. Discharge of Michael McBride

Michael McBride has been employed by The News as an editorial assistant in the Sports Department. He is a member of Guild Local 22. He went on strike on July 13, 1995, and has not returned to work. During the strike he picketed, leafleted, and worked on The Sunday Journal. By letter, dated July 29, 1997, he was informed that he was being discharged

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[51] There also has been no reasonable explanation as to how Lock's vehicle could have been at the Trade Vine store that night without him.

a second time for placing a star nail under the tire of a strike replacement employee's car on May 21, 1997.[52]

Mark Silverman testified that he made the decision to discharge McBride for this incident after reviewing certain documents, consisting of (1) an Employee and Contractor Incident Report, dated May 21, 1997, by John Bacon, stating that on that date Michael McBride walked in front of Bacon's parked car, leaned down, and placed a "tire star" between the tire and the pavement; (2) an unsworn affidavit of John Bacon, dated June 23, 1997, stating that on May 21, 1997, he saw McBride, with whom he worked for a year and a half and who has yelled at him several times during the strike, walk in front of Bacon's car which was parked opposite The News building, drop down in front of the right front tire as if to pick something up, come back up, and continue walking, that he immediately went to his car and found a "tire star" wedged between the tire and the road, and that he took it and turned it into Security; and (3) a copy of the photo identification card of Michael McBride. Silverman said that, based on the information in these documents, he determined that McBride had placed a star nail under the tire of Bacon's car, that this was expressly prohibited by the NLRB settlement and the Order of the Sixth Circuit, and that McBride should be discharged.

John Bacon is employed by The News as a feature writer. He testified that, on May 21, 1997, he had parked his car on Lafayette about a block from The News building. At about 3 p.m., he went to get something from his car and saw

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[52] McBride was also discharged for participating in the demonstration at The News' Macomb County bureau on October 16, 1996, discussed below.

McBride, with whom he had played hockey, and a companion walking towards him on the opposite side of the street. He became suspicious when McBride appeared to be avoiding eye contact with him and he stood under some scaffolding by the front door of the building to see what McBride might do. As he watched, McBride stopped to talk with the driver of a limousine parked on the street. After about 5 minutes, McBride and his companion crossed the street, walking between Bacon's car and the one in front of it. As they did so, McBride reached down near the front of his car for a second or two, but Bacon was unable to see what he did. After McBride left, Bacon went to his car and found a tire star wedged between his right front tire and the asphalt. He took it back to the building and turned it over to Security.

McBride testified that when he received the letter accusing him of putting a star nail under a strike replacement's car, he did not know to what it referred. He denied that he ever put a star nail under anyone's car. He said that he knows Bacon and that he did not put a star nail under his car.

Analysis and Conclusions

Contrary to the Respondent, I find that the Board's *Rubin Bros.* analysis should be applied in this case. Although the strike had ended prior to the incident, it is clear that it was related to the strike as it involved a striking employee and replacement worker, the Respondent handled it in the same manner as other incidents involving alleged strike misconduct, and the Personnel Action Report generated in connection with McBride's discharge states that the reason for his termination

was "Strike related activities."[53] I also find that the Respondent has established that it had a good-faith belief that McBride had engaged in serious misconduct by placing a star nail under the tire of Bacon's car based on his report and affidavit.

This is entirely a matter of credibility and it is particularly difficult because the evidence against McBride is largely circumstantial and, even if the incident did not in fact happen, it could be difficult for McBride to prove his innocence. However, having observed his demeanor while testifying and considered the content of his testimony, I have no reason not to credit Bacon. There is nothing to suggest that he bore any animosity towards McBride and I find it unlikely that he would have fabricated the incident.[54] Moreover, the specific details that Bacon provided, such as, the descriptions of McBride's companion and the limo driver and the license number of the limo, not only suggest he was telling the truth, they provided a possible means of discrediting his story, if it

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[53] Even if *Rubin Bros.* does not apply, it would not change the result. I would find that the General Counsel has made out a prima facie case under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). There is ample evidence of the Respondent's union animus in the numerous violations found herein and it was aware of McBride activities in support of the strike and his union. I would also conclude that the Respondent would have discharged McBride for placing the star nail under Bacon's car even in the absence of union activity on his part.

[54] If it did not happen and McBride could show he was not in the vicinity at the time, Bacon could have jeopardized his own employment.

was untrue. However, little was offered to do so other than McBride's self-serving denial. I find the testimony of John Joslin, who measured the distance Bacon was from where he saw McBride reach down in front of his car and found it to be 190 feet while Bacon said it was 40 to 50 feet, does not cast significant doubt on his veracity or conclusively establish that Bacon could not have seen McBride as he said.

While the evidence against McBride was circumstantial, it was not insubstantial and was sufficient to support the Respondent's good faith belief that he was responsible for the star nail Bacon found under his tire. I find that counsel for the General Counsel have not carried the burden of establishing by a preponderance of the evidence that McBride did not place the star nail under Bacon's car and have not proved a violation of the Act. I shall recommend that this allegation be dismissed.

19. Discharge of Steven Montagne and Warning to Gene Schroll

On August 13, 1996, there was a rally outside The News building. After it was over, an incident occurred at the parking lot on Lafayette Blvd. behind the DNA parking structure, which led to the discharge of DNA employees Frank and Peter Prainito and Steven Montagne and a written warning being issued to Gene Schroll. Only the disciplinary actions involving Montagne and Schroll are alleged to be unlawful in the complaint in this matter. Considering all of the evidence, there can be little doubt but that the Prainitos were largely responsible for instigating, escalating, and prolonging this unfortunate incident.

Montagne has worked for the DNA as a mailer since the JOA and previously worked for The Free Press, beginning in

August 1988. He is a member of Teamsters Local 2040. He went on strike on July 13, 1995, and has not returned to work. He attended rallies and did picket duty during the strike. By letter, dated September 18, 1996, he was informed that he had been discharged for his conduct on August 13, 1996, which involved trespassing on DNA property, threatening a DNA security guard, spitting on the guard, and making racial and/or sexually offensive remarks to him.

Schroll has worked for the DNA as a printer since the JOA and previously worked for one of the newspapers, beginning in July 1958. He is a member of DTU No.18. He went on strike on July 13, 1995, and was recalled in April 1997, after the Union's unconditional offer to return to work. By letter, dated September 18, 1996, he was informed that he had been issued a written warning for trespassing on DNA property on August 13, 1996.

Kelleher testified that he made the decisions to take disciplinary action against the four strikers involved in this incident after reviewing documents relating to the incident. The documents were (1) a DNA-APT Incident Report, dated August 13, 1996, by security guard Clifton Hinnant, Jr., concerning being spat on by a striker and squirting a hose at 3 strikers who came at him and threatened him with a picket sign at about 12:10 p.m. on that date; (2) an undated DNA Incident Report by Clifton Hinnant, Jr., concerning the same incident; (3) an unsworn affidavit of Clifton Hinnant, Jr., dated August 20, 1996, concerning his identification of photos of Frank and Peter Prainito and Schroll as persons involved in the incident and stating that he had been spat at by Frank Prainito earlier that day and had been spat on by an unknown white male during the 12:15 p.m. incident; (4) an unsworn affidavit of Clifton Hinnant, Jr., dated August 21, 1996, concerning his identification of a photograph of Steven

Montagne as the person who spat on him; (5) an unsworn affidavit of Peter Cashero, Sr., dated August 19, 1996, concerning what he observed and heard during the incident; (6) an unsworn affidavit of Peter Cashero, Sr., dated August 21, 1996, concerning his identification of Peter Prainito, from a photograph, as a person who came 10 to 15 feet onto DNA property swinging a picket sign at Hinnant in a threatening manner and directing racial slurs to him and his identification of Frank Prainito, from a photograph, as a person who made racial insults to Hinnant; (7) an unsworn affidavit of Robert Olsen, dated August 19, 1996, concerning what he observed and heard during the incident; (8) an unsworn affidavit of Robert Olsen, dated August 21, 1996, concerning his identification of Peter Prainito, from a photograph, as the person who rushed at Hinnant during the incident; (9) a copy of the photo identification card of Steven Montagne; (10) an undated DNA Investigations report by Jesse M. Bartlett concerning his investigation of the incident; and (11) a copy of the photo identification card of Gene Schroll. Based on the information in these documents, Kelleher concluded that Montagne was part of a group that trespassed on DNA property, threatened Hinnant, and directed racial slurs at him and that his actions warranted discharge. Kelleher also concluded that Schroll was also one of the individuals involved in the incident, although to a lesser degree than Montagne and the Prainitos, as he did nothing but trespass on the property and did not taunt or threaten Hinnant.

Montagne testified that on August 13, after attending the rally he was walking back to his car which was parked on Lafayette. As he passed the parking lot, the gate was open and Hinnant was standing inches from the sidewalk. He testified that earlier that day he had called Hinnant a "scab" and this time he called him a "pus bag" and continued walking. As he did so, he felt an arm and fist strike him a

fairly hard blow in the back. He turned around and said to Hinnant, "if that's as hard as you can hit, you're in trouble." Hinnant screamed at him over and over, "come on, come on, motherfucker, I'm tired of you guys." Montagne denied that he had spit on or at Hinnant, that he had ever directed any racial slurs or sexual remarks towards him, and that he had entered the DNA property. He said that after Hinnant struck him the two Prainitos, who were walking about 10 to 12 feet ahead of him, turned around and walked back towards him and had words with Hinnant. He did not recall what they said to Hinnant, who also said to them, "come on, motherfuckers." Montagne walked away and, when he got about 15 feet down the street, he heard a commotion, turned around, and saw Hinnant squirting a hose at the Prainitos who were running into the street. He yelled to them, "come on, let's go" and walked away. He did not report the incident to the police.

Schroll testified that, after he attended the rally on August 13, he and a coworker were walking back to his car on Lafayette. As he passed Third Street., there were three strikers walking together about 60 feet ahead of him. He saw a security guard run out of a parking area, strike one of the strikers, Montagne, in the back, and run back behind the fence. Montagne turned around and said something to the guard, then he smiled and walked away. He asked his coworker if he had seen what had happened, but he had not. They continued walking and when they got to the area the other two strikers, whom he knew were brothers, one of whom was named "Frank," were "having a verbal battle" with the guard, challenging him to come out and fight. He did not recall what Frank said but he was very upset and loud. He did not recall what the guard said but he squirted them with a hose. Schroll said that he was on the sidewalk a couple of feet from the parking lot but that he never entered DNA

property. He testified that he did not see Montagne interact with the guard or spit at him before he was struck and that Montagne definitely did not enter the DNA's property.

Clifton Hinnant testified that he was working as a security guard for APT on August 13, 1996, and was assigned to regulate traffic at the gate near the DNA garage. That morning two individuals walked by him and started yelling obscenities at him, called him a "toothless nigger," said, "I fucked your mama last night," and one spat at him. After the rally, he was standing 2 to 3 feet inside the gate, when the same individuals came by and one spat on his chest. Then, three or four people came towards him onto the DNA property, repeating the same slurs they had used earlier, and one of them was swinging a sign back and forth at him in a threatening manner. As he backed, up he picked up a water hose and sprayed the individuals to protect himself. He later identified the persons from ID cards he was shown. At the hearing, he was shown ID cards and identified Montagne as a person in the crowd who came towards him in the lot. He identified Frank Prainito as a person who had used racial slurs and came onto the DNA property. Hinnant denied that he had struck anyone during the incident, that he responded to any of the slurs directed at him, and that he had said anything to any of these individuals. On cross-examination, he said that the two persons who had passed him in the morning and came back in the afternoon were Frank and Peter Prainito. He said that when they came back in the afternoon there were two or three people with them, including, Schroll and Montagne. The Prainitos passed him first and Frank directed racial slurs at him from the sidewalk as he stood inside the gate. After doing so, Frank took the sign from his brother and came towards him, swinging it at him. As he backed up, the Prainitos continued to come towards him on the DNA property, as did Montagne, while Schroll and others remained

outside. He began squirting them with the hose and they left the property. He testified that the person who spat on him was not one of the Prainitos, but he was not sure who it was. He also testified that it was Peter Prainito who swung the picket sign at him.

Robert Olsen testified that on August 13, 1996, he was employed by a restoration company doing repair work on the DNA parking garage and was working in the fenced lot on Lafayette near the gate. He saw security guard Cliff Hinnant standing there when three or four guys walked by. The group called Hinnant a "toothless nigger" and said "they did his mother last night." About 2 hours later, he was working in the same place when he saw a crowd coming. Three or four of them had a couple of signs and they said to Hinnant they would "shove this sign up your f'ing ass" and that they "were going to kick his f'ing black ass." A couple of them crossed the border of the gate and Olsen ran to use the telephone in the garage to call for assistance.

Peter Cashero is a superintendent with the company that was working on the DNA garage on August 13, 1996. He testified that about 12:10 p.m., he was walking West on Lafayette from Third Street, when he heard shouting and saw some strikers hollering and swearing at one of the security guards, Hinnant. When he got to the gate he tried unsuccessfully to defuse things. He saw 3 strikers inside the fence verbally abusing Hinnant and swinging signs at him. He got in between the strikers and Hinnant and told them to back off. At the hearing he was shown ID cards and identified Frank Prainito, Schroll and Montagne, as being present at the incident. He said that the first two came inside the fence, but that Montagne was outside the fence the whole time. He said that he heard all four verbally abusing Hinnant.

Analysis and Conclusions

I find that the Respondent has established that it had a good-faith belief that Montagne had spat on Hinnant on August 13, 1996. This constituted serious misconduct which is grounds for discharge under *Clear Pine Mouldings*. However, I find that it had no reasonable basis to believe that Montagne had directed racial slurs or sexually offensive remarks towards Hinnant, that he had threatened Hinnant, or that he had trespassed on DNA property. The fact that Montagne was present when other misconduct was occurring does not impute culpability to him. There must be specific evidence of his participation in that misconduct. *General Telephone Co.*, supra at 739. In analyzing the documents on which Kelleher based his conclusions, I have assumed, as he obviously did, that everything stated therein was true. At most, the reports and affidavits of Hinnant taken together establish that he identified Montagne as the person who spat upon him during the 12:15 p.m. incident at the parking lot.[55] However, they also establish that, after he did so, Montagne walked away on Lafayette, while the Prainitos came onto DNA property towards Hinnant, verbally abusing him and swinging a picket sign at him. The affidavits of Cashero and Olsen state generally that a group of strikers directed verbal abuse at Hinnant and swung a sign at him; however, the only actions that are specifically identified are those of the Prainitos. The only references to Montagne in those affidavits are statements that they were shown his picture. Neither witness describes any specific action by Montagne. Insofar as

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[55] Although Hinnant's affidavit of August 21, 1996, in which he identifies Montagne from a photo, refers to a spitting incident on August 20, 1996, other details make it clear that he is referring to the incident on August 13, 1996.

Montagne is concerned, the report by Bartlett merely summarizes witnesses' statements.

I find that the evidence as a whole establishes that Montagne did not engage in any of the misconduct for which he was discharged. Montagne admitted calling Hinnant a "scab" when he passed on his way to the rally and calling him a "pus bag" when he returned. While hardly edifying, this did not constitute serious misconduct under *Clear Pine Mouldings*. See, e.g., *Calliope Designs*, 297 NLRB 510 (1989). I found nothing in Montagne's demeanor to indicate that he was not a truthful witness and I credit his testimony that he did not spit on Hinnant, that he did not direct any racial slurs or sexually offensive remarks to him, and that he did not enter onto the DNA's property. I also credit his testimony that Hinnant struck him in the back. The only evidence to the contrary is the testimony of Hinnant, which I do not credit.

Hinnant's claim that he never said anything to any of the strikers who directed verbal abuse towards him was simply not believable. Nor was his denial that he struck Montagne. Montagne's testimony that Hinnant struck him from b ind as he passed the parking lot gate is corroborated by the credible testimony of Schroll.[56] The evidence as a whole establishes that it was Hinnant's striking Montagne that triggered the Prainitos' trespass on the DNA property and their violent

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[56] I find it unnecessary to rely on Frank Prainito's testimony that he saw Hinnant strike Montagne since I did not find his other testimony about this entire incident to be credible and he was in front of Montagne when it happened. While neither Cashero nor Olsen saw Hinnant strike Montagne, they did not claim to have had Hinnant in view when the incident began or to have seen what started it.

assault on Hinnant. Prior to that, they had been content to limit their reprehensible conduct to verbal abuse and spitting. They had already passed by the place Hinnant was standing and something obviously occurred that caused them to turn around, come back, and confront him. Hinnant, who had twice been the target of the Prainitos' vile verbal abuse that day, had apparently had enough (as indicated by his saying to Montagne, "come on, motherfucker, I'm tired of you guys") and responded to Montagne's "pussbag" comment by coming out and striking him from behind. His testimony at the hearing was confused and contradicted by other evidence and his own reports and affidavits. When he was shown Montagne's picture and asked what he had done, Hinnant responded, "He was there in the crowd when they came toward me on the property." The Respondent's witness Cashero credibly testified that Montagne never entered the DNA property. Hinnant did not testify that Montagne spat on him.[57]

On cross-examination, Hinnant was emphatic that Montagne was the one who had come onto the parking lot with the Prainitos. He said that he had squirted them with the hose and that they backed off to the sidewalk and flagged down the police. He was asked who had spat on him and he responded that it was not Peter or Frank Prainito, but that he was not sure who it was. In the affidavit he gave on August 20, 1996, he said the Prainitos, Schroll and an unidentified person all approached him together and that the latter, who had a "reddish mustach" (sic), spat on him and then walked

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[57] I do not consider his redirect testimony, in which he was asked about the contents of his unsworn affidavits that had been gone into on cross-examination for impeachment purposes, to constitute evidence that Montagne spat on him.

west on Lafayette. At the hearing, he stated that Montagne had no facial hair at the time of the incident. On August 21, 1996, he gave another affidavit in which he stated that the unidentified person who spat on him was Montagne, but he also stated that Montagne had left the area before the police arrived. At the hearing, when asked about the discrepancies in his statements concerning Montagne's whereabouts during the incident, he stated that he did not know who the person was who had spat on him. Considering all of the foregoing and his demeanor while testifying, I found Hinnant to be an unreliable witness and do not credit his testimony that Montagne came at him in the parking lot nor his denial that he struck Montagne in the back. I find that there is no credible evidence that establishes that Montagne spat on Hinnant and none that contradicts Montagne's believable and persuasive testimony that he did not spit on or threaten Hinnant, that he did not direct racial slurs or sexually offensive comments towards him, and that he did not trespass on DNA property on August 13, 1996. Consequently, I find that the General Counsel has proved by a preponderance of the evidence that the Respondent's discharge of Montagne violated Section 8(a)(3) and (1).

While it is a very close, I find that the Respondent has established a good-faith belief that Schroll had trespassed on DNA property. Since this happened at the same time the Prainitos were verbally abusing and swinging a sign at Hinnant, I find that it believed that Schroll was a participant in an incident that was coercive and intimidating to a nonemployee and constituted misconduct under the *Clear Pine Mouldings* test. Although the written statements of Hinnant concerning Schroll are ambiguous, Bartlett's investigation report states that Hinnant identified Schroll as one of the people who came on the DNA's property during the incident. Under *General Telephone*, an employer can premise its belief

of striker misconduct on such reports. Accordingly, I find this sufficient to establish a good-faith belief on the Respondent's part with respect to Schroll.

The evidence is that three persons came onto the DNA property that day. Schroll denied doing so and Hinnant testified that the third person who came onto the property with the Prainitos was Montagne. Cashero, however, testified that the third person was Schroll. While I found no reason to doubt the bulk of Schroll's generally credible testimony, I also found no reason to doubt the equally credible testimony of Cashero, who has no direct interest in the outcome of this matter. Schroll admitted that he was one of those Hinnant sprayed with the hose. The evidence as a whole indicates that the persons he sprayed were on the DNA property. I find that the General Counsel has not established by a preponderance of the evidence that Schroll did not trespass on DNA property on August 13, 1996. Since the incident was coercive, it cannot be said that the warning given to Schroll for participating in it, although to a minor extent, was unwarranted. I shall recommend that this allegation be dismissed.

20. Discharge of Joseph Moore

At the time of the strike, Joseph Moore was employed by the DNA. He had previously worked for The News for a total of over 16 years with both. He is a member of Teamsters Local 372, went on strike on July 13, 1995, and has not returned to work. By letter, dated August 4, 1995, he was informed that he was being discharged for throwing nails under the tires of a van as it entered a DNA distribution center on July 17, 1995.

Kelleher testified that he made the decision to discharge Moore after reviewing documents relating to the incident. The documents were (1) a copy of Moore's photo identification card; (2) a DNA Incident Report, signed by James Pappas, dated July 17, 1995, with an attached Video Tape Log; (3) an unsworn affidavit of James Pappas, dated 27, 1995; and (4) an unsworn affidavit of James Pappas, dated July 31, 1995. Based on the information in these documents, he concluded that Moore had been observed and identified by security guard James Pappas as an individual who threw nails into the driveway of the facility as vehicles were entering.

Moore testified that on July 17 he was among a couple hundred people picketing at the Lincoln Park Distribution Center. His shift ran from about midnight until noon. He testified that he never threw any nails at the picket line but that he saw nails there that night. Around 2:30 or 3 a.m., he saw a gray car come out through the picket line and the driver threw nails onto the driveway near where he was walking. He picked up some of the nails and gave them to a security guard standing nearby. He picked up others and placed them in a trash bag because the guard was reluctant to take them from him.

James Pappas testified that during July 1995 he was employed as a security guard and videographer by APT and was assigned to the Detroit newspaper strike. He observed and videotaped the July 17 incident involving Moore at the Lincoln Park facility.[58] He testified that he observed a white van entering the facility. It passed by an individual who threw

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[58] Pappas testified that he was trained to videotape with both eyes open enabling him to both observe and video a particular scene.

nails underneath it, reached out and scratched the van with a nail, and then threw the nail on the ground. Immediately thereafter, he saw about a dozen nails, about 2 inches long, on the driveway. Within 5 minutes after the incident, the individual who threw the nails was identified to him as Moore by a DNA employee from the video and after viewing him on the picket line. At the hearing, Pappas identified Moore from the photo identification card in evidence as the person he observed during the July 17 incident, as he had also done when he gave the affidavit on July 31, 1995.

Analysis and Conclusions

I find that Moore was on strike at the time of the incident for which he was discharged, that it took place at a picket line, and that the Respondent considered him to be a striker. I also find that the Respondent had a good-faith belief that Moore had thrown nails in a driveway being used by vehicles to cross a picket line and enter one of its facilities. Such an attempt to damage and/or impede vehicles crossing a picket line constitutes serious misconduct and is sufficient justification for discharge. See, e.g., *Beaird Industries*, supra at 795-796; *Columbia Portland Cement Co.*, supra at 420.

The credible testimony of Pappas establishes that on July 17, 1995, Moore threw nails on the driveway to a DNA distribution center as a van was entering the facility. Having observed Moore's demeanor while testifying about this and another matter, discussed below, I did not find him to be an impressive or believable witness. I found his attempt to divert attention from his own actions by claiming to have seen nails thrown on the driveway hours earlier, allegedly from a vehicle of a replacement worker, did nothing to counter Pappas' credible testimony about this incident. I find that the General Counsel has not established by a preponderance of

the evidence that Moore did not engage in the misconduct for which he was discharged and has not proved a violation of the Act. I shall recommend that this allegation be dismissed.

21. Discharge of Marc Naumoff

Marc Naumoff has been employed by the DNA since the JOA as a truckdriver. He had previously worked for The News, beginning in 1981. He is a member of Teamsters Local 372, went on strike on July 13, 1995, and has not returned to work. He testified that he had picketed during the strike. By letter, dated February 2, 1996, he was informed that he was being discharged for dropping star nails on the ground in and around the Oak Park Distribution Center on January 9, 1996.

Kelleher testified that he made the decision to discharge Naumoff after reviewing a number of documents. The documents were (1) a copy of the photo identification card of Naumoff; (2) an Oak Park Department of Public Safety Incident Report concerning damage to the tire of the vehicle of Karyn Carrico, a newspaper carrier, while exiting the Oak Park Distribution Center on January 9, 1996, and her identification of Naumoff as the person she had seen approach her vehicle and drop something; (3) a report by Officer Matthew Young concerning his retrieving the star nail which was lodged in the tire of Carrico's vehicle on January 9, 1996, with an attached statement by Carrico about the incident; and (4) an Oak Park Department of Public Safety Incident Report containing a statement by Carrico about the incident on January 9, 1996. Kelleher testified that these documents indicated that Carrico had identified Naumoff as the person who had dropped star nails as she was exiting the facility, one of which was removed from her tire, and that a police officer had observed Naumoff making a throwing motion and immediately thereafter found two star nails in an

area that had been searched previously and had none. Based on that, he concluded that Naumoff had dropped star nails to prevent people from entering and exiting the facility and that he should be terminated.

Naumoff testified that he was picketing at the entrance to the Oak Park facility on January 9 with about 8 to 12 picketers beginning about 1 a.m. When he arrived he saw star nails in cracks in the asphalt of the driveway which he did not pick up. At about 4 a.m., he noticed a car, driven by a woman he later learned was Carrico, exit through the pickets who were walking in a circle on the driveway. He was standing with others on the driver's side of the car as it exited. The car turned left and went to the intersection, made a U-turn, came back, and pulled up next to a police car parked across the street. The woman talked to the police and pointed to her front tire. A police officer walked over to the picket line and asked if anyone had thrown star nails. Everyone said "no." He searched the driveway with a flashlight, then went back to his car. About 5 a.m., a police officer entered the facility and came out to the picket line. Another police officer arrived and told the pickets that he had to pat them down. Naumoff walked over to where some pickets had gotten in their vehicles preparing to leave and told them they had to be searched. He was searched and nothing was found on him. The police officers walked over to the area where he had just been, found two star nails, and asked if he had thrown them there. He said "no." He was asked where his car was and said that he had ridden with John Roelans. They asked Roelans if they could search his vehicle and he agreed. After doing so, the police officers showed him two star nails they said they had found in the vehicle and asked if he had seen them. He said "no." He was arrested and charged with malicious destruction of property under $100. He went to trial on the charge, at which Carrico appeared as a witness,

and was found not guilty. Naumoff testified that he had not seen the star nails the police officer found in Roelans' vehicle, that he did not have any star nails in his possession that day, and that he did not drop any. Naumoff testified that he was wearing brown bib overalls that night, as were two or three others, and had on a stocking cap, as did most of the pickets.

Karyn Carrico testified that she has worked as a newspaper carrier off and on since 1977. She continued to do so during the strike. On the morning of January 9, 1996, she went to the Oak Park Distribution Center to pick up her newspapers. As she drove out of the driveway, there was a crowd of 8 to 10 or more picketers present, one of whom walked quickly towards her vehicle from about 15 feet away. As she pulled out, she opened her window to listen for star nails, as she had run over one before that nearly caused her to lose control of her vehicle, and she heard a clicking sound. She turned around and drove back to where police officers were sitting opposite the driveway. She asked if they knew where she could get her tire repaired and pointed out the person who was by her car. He was wearing khaki bib overalls, a dark coat and a dark knit cap. She said he was the only one dressed like that. She did not look at his face and identified him only by his clothing. She got her tire changed and finished her route. After she got home, a police officer came and took the nail out of her tire as evidence. On cross-examination, Carrico testified that she did not see the person she had identified throw or drop any star nails. She appeared as a witness at a criminal trial but was unable to identify the person because he was not wearing the same clothes as the person she saw that night.

Andrew Potter is a public safety officer with the Oak Park Public Safety Department. He testified that on January 9, 1996, he was working in front of the Oak Park facility and

was in a fully marked police car parked across the street from it. Carrico approached him and said that she had a star nail in her left front tire. He saw the star nail but did not remove it because the tire would have deflated. Carrico pointed out a striker with a pony tail wearing tan bib overalls, who was later identified as Naumoff. The officers went to the picketers and told them they would be patted down for star nails. At that point Naumoff raised Potter's suspicion by walking away from the rest of the strikers and making a motion as if he was dropping something. As Potter walked towards where Naumoff was standing, he walked away. Potter looked down and saw 2 star nails on the ground where Naumoff had been. The star nails were stamped from a piece of sheet metal and both ends were bent so that one end would always be sticking up, as opposed to those made by welding a number of bent nails together. Naumoff denied that he had dropped the star nails and none were found on him when he was patted down. Potter asked for permission to search the truck that Naumoff had ridden in from the owner, Roelans, which was granted. When Roelans opened the truck door, Potter saw 2 star nails on the floor in front of the right front seat of the truck. They were of a different type than those he had previously picked up. He arrested Roelans and Naumoff.

Matthew Young is an Oak Park public safety officer. He testified that he went to Carrico's home on January 9, 1996. He photographed and retrieved a star nail from the tire of her vehicle. The photos and the star nail were destroyed after the criminal trial. He testified that the star nail he retrieved was made of two pieces of metal that had been welded together.

Analysis and Conclusions

I find that the Respondent has established that it had a good-faith belief that Naumoff threw a star nail that damaged

Carrico's tire, based on the police report which states that Carrico reported seeing a person, later identified as Naumoff, approach her vehicle and drop something, immediately, before she heard something in her left front tire. This, coupled with the circumstantial evidence that star nails were found near where Naumoff was standing and in the vehicle in which he had ridden provided sufficient reason for Kelleher to believe Naumoff had engaged in serious misconduct.

The fact that Naumoff may have been acquitted in a criminal trial does not necessarily mean that he did not engage in the misconduct for which he was discharged.[59] The acquittal is not conclusive, given the difference in the burden of proof in a criminal proceeding (beyond a reasonable doubt) and in this one (preponderance of the evidence). Burden of proof is the determining factor in this case. The only evidence presented by the General Counsel was Naumoff's self-serving denial. Having observed his demeanor and considered his testimony as a whole, I do not credit him. It came across as a contrived attempt to explain away all of the circumstantial evidence against him. While the elements of his story, taken separately, might sound reasonable; when combined, they do not. Faced with the fact that Carrico's vehicle was damaged by a star nail, Naumoff claimed that there were star nails in the driveway when he got there. Immediately after being told by the police that he would be searched for star nails, Naumoff wandered away from the group of pickets. He concedes that he did so, but says it was to assist the police by making sure that some pickets, who had gotten into their

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[59] Although I would not find Naumoff's self-serving statement sufficient to establish that he was acquitted, under the circumstances, there is no reason to doubt Officer Potter's testimony to that effect.

vehicles and were preparing to leave, came back to be searched. I find it much more likely that it was to get rid of the star nails Potter found in the area to which he had seen Naumoff walk and while there make a dropping motion with his hand. Faced with the fact that star nails were found on the floor of the right side of the vehicle in which Naumoff had ridden to Oak Park as a passenger, he denied having seen them. I did not believe him. Since the Respondent established that it had a good faith belief that Naumoff engaged in misconduct, it was up to counsel for the General Counsel to establish by a preponderance of the evidence that Naumoff did not engage in that misconduct. They have not done so.[60] Moreover, even though the evidence fails to directly establish that Naumoff was responsible for the nail that damaged Carrico's tire,[61] I find that there is compelling circumstantial evidence that he engaged in misconduct. The evidence establishes that Naumoff had star nails in his possession at the scene that day and that he attempted to dispose of them by dropping them on the ground when faced with a search by the police.[62] I find this is sufficient, under *General Telephone*, to

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[60] The testimony of John Roelans that he did not see Naumoff with any star nails that night and did not know how the star nails got into his vehicle added nothing significant.

[61] I find the testimony of Carrico is insufficient to establish that the person, who approached her vehicle as it crossed the picket line, threw or dropped a star nail as her vehicle passed by. I also find it is insufficient to establish that Naumoff was that person. She never saw his face, she identified the person at the scene by clothing only, and she could not identify Naumoff as the person at the criminal trial.

[62] All of the picketers who were present were searched and none had any star nails in their possession.

identify him as a participant in the specific misconduct that undeniably occurred there that morning.

22. Discharge of Barry Patterson

Barry Patterson has been employed by the DNA as a pressman. He is a member of GCIU Local 13N. He went on strike on July 13, 1995, and has not returned to work. By letter, dated August 2, 1996, he was informed that he had been discharged for throwing a projectile at an employee's vehicle, breaking its windshield, as it exited the North Plant on April 11, 1996.

Kelleher testified that he made the decision to discharge Patterson after reviewing documents relating to the incident. The documents were (1) a copy of the photo identification card of Patterson; (2) a statement of Jeffery Kirchler, dated July 17, 1996, concerning the incident on April 11, 1996, and his identification of a photo of Patterson; (3) a statement of Stephen Bayer, dated July 17, 1996, concerning the incident and his identification of a photo of Patterson; (4) a Sterling Heights Police Department Report concerning the incident, dated April 12, 1996; and (5) several Sterling Heights Police Department followup reports concerning the incident. Based on the statements of Bayer and Kirchler, he concluded that Patterson had thrown a projectile that damaged the vehicle in which they were riding, this was not protected activity, and that Patterson should be discharged.

Patterson testified that on the night of April 11 he was among a group of picketers at the East side of the driveway of the back gate of the North Plant, on 16 Mile Road, which was locked and not used for traffic. He first noticed a van, which was headed West on 16 Mile Road, when it pulled into a turnaround and stopped near the median about 60 yards

from where he was picketing. After about 20 minutes, he saw two men get out of the van and walk onto the median. About 20 minutes after that, five or six police cars came to the driveway and he was arrested for allegedly throwing something. On the advice of counsel, he pled no contest under advisement and after 6 months the charge was dismissed. As a result of his plea, he was required to serve 25 days in jail on an unrelated DUI charge. He also made restitution for the damage to the vehicle. He denied that he threw anything at a vehicle that night.

Jeffery Kirchler is a press crew director at the DNA and in April 1996 was a press operator at the North Plant. He testified that, on the night of April 11, 1996, he went to lunch at about 11 p.m. He drove out the gate and turned right onto Mound Road and made another right onto 16 Mile Road. As he passed the gate to the plant on 16 Mile, he saw a striker jump out from a group, put his arm back and throw what looked like a piece of cement which struck and smashed his windshield. He stopped on the road and looked at the person. Then, he turned around, called the police, and pulled over to wait for them. He kept the person who had thrown the object in sight while waiting. When the police arrived within a few minutes, he told them what had happened and identified the perpetrator to them. He described him as a white male, a little under 6 feet, a little under 200 pounds, having brown hair, and wearing dark rimmed glasses, work boots, blue jeans, a brown jacket, and a blue or black baseball cap. At the hearing, he identified Patterson as the perpetrator from a photo in the record. On cross-examination, he testified that his vehicle was not marked in any way and that there were no other vehicles nearby on 16 Mile when it was struck. After being struck, he stopped about 20 feet past the picketers for about a minute and a half and told his passenger to keep his eye on the person who threw the object. He then proceeded

east about a quarter of a mile to a turnaround, came back to the area in about a minute, and called the police on his cellular phone. He parked in the left turn lane on 16 Mile and waited for the police, who arrived in about 3 or 4 minutes. He rode in the police car to where the picketers were located and identified the perpetrator, who was sitting about 3 feet away from him.

Stephen Bayer testified that he is currently employed by the Chicago Tribune and that on April 11, 1996, he worked for the DNA. On that date, he was going to lunch in Kirchler's vehicle. As they passed the gate on 16 Mile Road, he saw a group of picketers gathered around a fire barrel. One of them stepped out and threw an object which struck the windshield of their vehicle. They stopped and he looked at the person who threw the object and made a note of what he was wearing. They drove to the next turnaround, came back, and parked on the other side of the road. He got out of the vehicle and kept his eye on the perpetrator until the police arrived and while they were talking to Kirchler. The police first took Kirchler over to the picket line and then took him over to identify the person, which he did. He described the perpetrator as wearing blue jeans, a white shirt, a brown jacket, eyeglasses, and a dark baseball cap. Later, they went down the road with some other police officers who took photographs of the damage to the van. At the hearing, he identified Patterson as the perpetrator from a photograph in the record.

Mark Javit is a police officer with the Sterling Heights Police Department. He testified that on the night of the incident he was dispatched to the scene and met with Kirchler, whose vehicle had been damaged. He observed damage to the vehicle's windshield. The individuals in the vehicle identified the person who threw the object at their

vehicle. He arrested a person named Patterson who declined to make any statement.

Analysis and Conclusions

I find that the incident for which Patterson was discharged occurred at a picket line, that he was on strike at the time, and that the Respondent considered him to be a striker. I also find that the Respondent has established that it had a good faith belief that Patterson had thrown an object at a vehicle in which employees were riding and had shattered its windshield. This constitutes serious misconduct under *Clear Pine Mouldings* and is grounds for discharge. Kelleher based his decision on the eye-witness accounts of the two employees in the vehicle, both of whom positively identified Patterson as the perpetrator.

There is convincing evidence that Kirchler's vehicle was damaged by an object that was thrown at it that night as it passed a group of picketers on 16 Mile Road, which included Patterson. The credible testimony of both Kirchler and Bayer establishes that they both saw Patterson throw the object. I find nothing in the record which casts any significant doubt on the veracity of either of these witnesses, their ability to observe, or their identifications of Patterson at the scene and/or at the hearing. Considering demeanor and the evidence as a whole, I found them far more credible than the self-serving testimony of Patterson.

The only real challenge to their version of the incident is the testimony of Michael Lorentz, a Local 13N member who went out on strike, has been recalled, and is currently working for the DNA as a pressman. Lorentz testified that, on the night Patterson was arrested, he was among the group

picketing at the gate on 16 Mile Road.[63] He testified that he first saw the van going east on 16 Mile and that it caught his attention because it was going so slowly (20 to 25 miles per hour) on a road on which a speed of about 50 is normal. He said that he watched the van until it went over a hill out of his view and that he did not see anything thrown at it. Specifically, he did not see Patterson, who was within 5 or 10 feet of him, throw anything at it. As a current employee of the Respondent with no direct interest in this matter, it may be unlikely that Lorentz would testify falsely,[64] but I did not believe him. As noted, there is credible evidence that the van was severely damaged as it passed the location where Lorentz was standing. His testimony, in effect, was that the damage did not happen there (or at all). This may be understandable as, under the circumstances, it would be difficult for him to admit seeing the vehicle damaged but deny knowledge of who

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[63] At first glance, it strains credulity to believe that of all those who went out on strike the same person, Lorentz, would be present at both of the incidents in this matter involving vehicles which had their windshields broken by objects allegedly thrown by picketers and, that during each incident, he would be standing near the person accused of doing the damage. However, after considering all of the evidence, I am convinced that he was in fact present at both incidents. Those accused, Patterson and Heckart, identified him as being there and, like them, Lorentz is a pressman and member of Local 13N. Moreover, his knowledge of the details of these incidents (both of which occurred at the North Plant, albeit, nearly eight months apart) convinces me that he was present at both.

[64] See, e.g., *Stanford Realty Associates*, 306 NLRB 1061, 1064 (1992); *Kelleher-Mart Corp.*, 268 NLRB 246, 250 (1983); *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961).

did it. But it is simply not credible, as was much of his testimony about this incident.[65]

Both Patterson and Lorentz testified generally that the area the picketers were in that night was unlit. However, Kirchler credibly testified that the roadway was well-lighted by street lights, that the DNA had erected additional light towers near the driveway, and that the lights from one of those towers was shining on the picketers. He also identified the perpetrator as wearing dark-rimmed glasses, work boots, blue jeans, a brown jacket, and a dark baseball cap, all of which Patterson admits he was wearing that night.[66] I do not find it surprising

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[65] For example, he seemed so intent on giving testimony to establish that Patterson had been misidentified that it did not matter what the question was.

> Q. (By Ms. Fedewa) And you said -- How many pickets were there that evening?
> A. There were 15 maybe 20 pickets and it was a cold night. There was a chill. Most of the pickets were wearing Carharts. You know their clothes were basically -- a good 60 percent of them all had the same colored clothes on.
> . . .
> Q. (By Mr. Vercruysse) What were you wearing that evening?
> A. I was wearing Carharts. The same colored jacket that Mr. Patterson and maybe 8 to 10 other people had on.
> . . .
> Q. (By Mr. Vercruysse) What color was Mr. Patterson's [jacket]?
> A. Same. Plus 5, 6, 8 maybe -- as many as 7 or 8 other people had the same colored coats on.
> . . .

[66] Considering all of the evidence, I do not find the fact that Kirchler estimated the perpetrator to be a little under 6 feet tall and

or damaging to their credibility that, at the hearing, neither Kirchler nor Bayer could recall the height or clothing of others among the dozen or more picketers who were present that night. Unlike Patterson, they had done nothing to focus attention on themselves. The fact that Patterson was out of their sight for up to 2 minutes while the van turned around on 16 Mile is not significant, as both Kirchler and Bayer had seen him and noted his appearance before driving away from the area to turn around. When they returned, he was still there and they kept him in sight until they pointed him out to the police.[67] It may be argued that Patterson could not have known that the unmarked van contained DNA employees, inasmuch as, 16 Mile is a busy thoroughfare and the Mound Road gate, from which it exited, cannot be seen from the gate on 16 Mile. The argument fails for two reasons. First, the van was, in fact, struck and damaged and this was serious misconduct regardless of who was inside. Second, Kirchler credibly testified that when he exited the Mound Road gate,

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to weigh a little less than 200 pounds, while Patterson says he is about 5 feet 4 inches and weighs about 135 pounds, to be significant. Patterson was wearing boots and had a sweatshirt on under his jacket. He may well have appeared to be larger than he is. Bayer, on the other hand, described the perpetrator as "medium build" and "medium" height, 5' 6" or 5' 7".

[67] This is entirely different than the incident involving Robert Heckart, discussed above. There, a witness who allegedly identified Heckart at the scene, well after the incident, solely on the basis of the fact that he was wearing blue jeans, could not describe or identify him at the hearing. Here, both witnesses not only saw Patterson throw the object but had a clear view of him immediately afterward when they stopped and looked back at him. Moreover, both made positive identifications of Patterson at the scene on the night of the incident and at the hearing.

he saw picketers there who had walkie-talkies and heard someone say, "two of them coming out of the gate now." Lorentz admitted that the picketers at the 16 Mile gate had a walkie-talkie and that they were given information about vehicles exiting the Mound Road gate. This information included a warning that a van had allegedly brushed back a group of picketers and to be on the watch for it.

I find that the General Counsel has not established by a preponderance of the evidence that Patterson did not engage in the conduct for which he was discharged and has not proved a violation of the Act. I shall recommend that this allegation be dismissed.

23. Discharges of Shelby Perkins and Gary Ryan

Both Shelby Perkins and Gary Ryan have been employed by the DNA since the JOA went into effect. Both had previously been employed by the Free Press since May 1986 and June 1981, respectively. Both are members of Teamsters Local 372 and went on strike on July 15, 1995. Both received letters from Kelleher, dated August 1, 1995, informing them that they had been discharged for stealing newspapers from a market on July 17, 1995.

On the morning of July 17, Perkins and Ryan were present at the Lincoln Park Distribution Center picketing with other striking employees. While there, they were involved in a conversation with other striking employees, including Gary Russeau, about stores that were selling newspapers during the strike. Later that morning, riding in Perkins' van, they

followed the truck of a DNA single copy driver[68] while he made deliveries in order to ascertain what establishments were selling newspapers. While doing so, they noticed that at times they were being followed and were being videotaped by what they identified as two Vance security guards riding in a Ford Taurus.[69]

They believed that 3 of the businesses at which the truck stopped had agreed not to sell newspapers during the strike. At about 6 a.m., the DNA driver dropped off 10 newspapers at one of these, the Blue Jay Market at Fort and Vasser Streets in Detroit, which had not yet opened for business. Ryan got out and picked up the papers and put them in the van. At another, a gas station on Fort Street, which was already open and had a sign in the window saying it did not want newspapers, the manager told the DNA driver not to leave any newspapers and he did not. The third was a Royal Foods market that also had not opened when the newspapers were dropped off. They stopped there and picked up the newspapers that the driver had dropped off. While there, they were joined in the parking lot by Russeau who drove up in his van and another person who rode up on bicycle. The latter took the newspapers and put them in a trash dumpster behind the store. While this was going on, the Vance guards were across the street videotaping them.

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[68] Single copy drivers deliver newspapers to newspaper vending machines (racks) and retail establishments which sell them to the public.

[69] Perkins said that he merely assumed that they were "Vance" guards because that is what he was told. However, he testified the individuals in the car were wearing uniforms similar to those worn by security guards he had seen at picket lines.

They went back to the picket line until about 8:45 a.m. when they returned to the Royal Foods market which was about to open. They identified themselves to the manager as union members, discussed with him not selling newspapers during the strike, and told him that they had put the newspapers that had already been delivered in the dumpster. The manager accepted their offer to pay for those newspapers, they paid him $7 for 20 newspapers, in order to keep them out of circulation, and got a receipt. Next, they went back to the Blue Jay Market and spoke to the person who subsequently arrived to open the store. They paid $3.50 for the 10 newspapers they had previously taken and got a receipt. The foregoing findings are based on the credible, consistent and uncontradicted testimony of Perkins and Ryan.

Kelleher testified that he made the decisions to discharge Perkins and Ryan after reviewing the August 1, 1995 affidavit of Steven Schneider, a security guard who observed their actions on July 17, a videotape of the Royal Foods market incident, and the photo ID cards of Perkins and Ryan. Schneider's affidavit states that he is an employee of Huffmaster Associates, Inc., which was a security firm used by the DNA during the early part of the strike. On July 17, 1995, he got a radio call that a DNA vehicle was being followed by a van. He and another security guard drove to the area, arriving about 6:25 a.m., and observed a white van that appeared to be following the DNA vehicle. When the DNA vehicle stopped at a market to make a delivery they pulled into an alley across the way to watch. After the driver dropped off newspapers and left the area, the white van pulled into the parking lot in front of the market and the passenger got out. He observed that after the passenger walked toward the door of the market and had returned to the van, the bundle of newspapers was gone. As the white van began to drive out of the lot, a red minivan pulled in and the occupants of the

two vehicles conversed. The affidavit states that Schneider got a good look at both men in the white van and that he was sure he could identify them if he saw them again. Based on the foregoing evidence, Kelleher concluded that the two individuals in the van were Perkins and Ryan; that they had removed the newspapers from the location to which they had been delivered; that this constituted theft and was not protected activity; and that they should be discharged.

Analysis and Conclusions

I find that Perkins and Ryan were on strike at the time of this incident and that the Respondent considered them to be strikers when it discharged them. I also find that under all the circumstances they were engaged in strike-related activity, as their actions were part of their attempts to convince store operators to support the strike by refraining from selling the newspapers. Consequently, I find the *Rubin Bros.* analysis applies to these discharges.

I find that, based on the limited information available to it, the Respondent had a good-faith belief that Perkins and Ryan had stolen newspapers from in front of the Royal Foods market. Although the videotape of the incident is not in evidence and its whereabouts has not been accounted for, I found Kelleher to be a credible witness. I do not doubt that he observed the removal of the newspapers on the videotape or that he was able to identify Perkins and Ryan from the video and their ID cards. There is no evidence that, at the time he made his decision to discharge them, Kelleher was aware of what transpired between Perkins and Ryan and the Royal Foods market after the newspapers were picked up by Ryan.

I also find that the General Counsel has established that the employees did not engage in the conduct for which they

were discharged, i.e., theft. The evidence clearly establishes that Perkins and Ryan paid in full for the newspapers they are alleged to have stolen. There is no evidence that they were ever charged with a crime or that the market to which the newspapers had been delivered was deprived of anything by their actions. Considering all of the evidence concerning this incident, I find that, technically speaking, Perkins and Ryan were not guilty of theft as a matter of law and more important, as a practical matter, their actions did not constitute grounds for any disciplinary action being taken against them. What the evidence establishes is a *purchase* of the newspapers in question, not a *theft*. The common law definition of "theft" requires the taking away of the personal property of another in lawful possession thereof with the intent to wrongfully keep it. See, e.g., *U.S. v. Hill*, 835 F.2d 759 (10th Cir. 1987); *U.S. v. Sellers*, 670 F.2d 853 (9th Cir. 1982). Here, inasmuch as the market was paid in full for the newspapers, before it had even opened for business, there was no unlawful taking or wrongful intent to deprive the owner of its property. Moreover, even if their ultimate purpose was to keep the newspapers out of the hands of the public, that was not grounds for disciplinary action against them, anymore than if they had paid for and removed all of the newspapers from a rack. I find that the Respondent violated Section 8(a)(3) and (1) by discharging Perkins and Ryan because of this incident. I also find that the Respondent discriminated against Perkins and Ryan by discharging them for the alleged theft of 10 newspapers while, as discussed below, it took lesser disciplinary action against 2 nonstriking employees who did in fact steal newspapers from it.

24. Discharge of Daniel Piasecki

The DNA has employed Daniel Piasecki as a single copy driver since the JOA. He had previously worked for The Free

Press, beginning in January 1977. He is a member of Teamsters Local 372. He went on strike on July 15, 1995, and has not returned to work. He testified that he did picketing and leafleting during the strike. By letter, dated December 20, 1995, he was informed that he was being discharged for striking a DNA employee on November 11, 1995, in Southfield, Michigan.

Kelleher testified that he made the decision to discharge Piasecki after reviewing certain documents. The documents were (1) a copy of Piasecki's photo identification card; (2) an unsworn affidavit of John Leininger, dated November 11, 1995, describing being struck in the head by a person who came up to him while he was delivering newspapers to a gas station in Southfield on November 11, 1995, and his identification of Piasecki from a photo identification card; and (3) a Southfield Police Department report, dated November 11, 1995, stating, inter alia, that Leininger had complained that he had been assaulted by Piasecki on that date, and describing an interview with Piasecki in which he said that he had exchanged words with Leininger, that he did not hit Leininger intentionally, but that he had shoved him and his hands may have made contact with his face; and noting that Piasecki had an abrasion on the knuckle of his left hand. Based on the information in these documents, Kelleher concluded that Piasecki had approached Leininger while he was dropping off newspapers, had made remarks to him and struck him and that his actions warranted discharge.

Piasecki testified that during the strike he worked as a single copy driver for The Oakland Press. On November 11, 1995, at about 4 a.m., he stopped to make a delivery at a Citco gas station and saw a DNA van there. He saw the driver and asked him "how it felt to be a scab." The driver became angry, bumped Piasecki with his chest, and asked if

he "wanted a piece of him." Piasecki shoved him away by placing his open hands against his chest area. The driver said that he knew who Piasecki was and they discussed how he knew him and why he had taken a job with the DNA. Piasecki returned to his vehicle and continued on his route. He denied that he had hit the driver in the face or the head. After he left the gas station, the driver followed him and flagged down a police officer. About half a mile down the road, he was pulled over and was questioned by the Southfield police. They asked what had happened, several times, and he told them. They asked if it was possible that when he shoved the driver if it was possible that his hands slipped up to his face. He answered that it was possible, but not to his recollection. He testified that he had a small abrasion on the back his left hand that he got from a newspaper rack. He was later charged with misdemeanor assault and battery. He pled "no contest under advisement" on the advice of his attorney and paid a $500 fine. He said that prior to encountering the driver he had seen security guards while making a delivery at a drug store and this caused him to be on edge and cautious. This was "because of several things that had been taking place . . . during the strike on the roads with their security people and strikers," although nothing had happened to him.

Leininger testified that he has been a single copy driver for the DNA since August 1995. On November 11, 1995, he was delivering newspapers to a Citgo gas station about 4:30 a.m. While he was standing by his truck, an Oakland Press vehicle pulled up, the driver, who he identified as Piasecki, dropped off some newspapers, called him a "fucking scab," and used other profanity. Piasecki came over to his van, they approached to within a foot of one another, and had a heated exchange of words. He asked Piasecki to "back off." Piasecki called him a scab and said he was taking his job away, and hit him on the left side of the head. He tried to duck and could

not say if it was a fist or an open hand that struck him. As Piasecki backed up toward his vehicle, he challenged him to fight, saying, "come on, let's go," but Leininger stayed where he was. They both got into their vehicles and he followed Piasecki in order to get his license number. When he saw a police officer, he pulled over and reported that he had been hit. The police officer told him to wait there and pulled over Piasecki down the road. He denied that he had struck Piasecki during the confrontation.

Christopher Helgert is a police detective with the Southfield Police Department. He testified that on the morning of November 11, 1995, at about 4 a.m., he noticed two vans approaching. Leininger, who was in the second van, stopped and told him that he had been hit by the person in the first van. He pulled over Piasecki, who said that he and Leininger had an exchange of words at a gas station, that Leininger had approached him and bumped into him, and that he had pushed Leininger away. Piasecki said that one of his hands may have come up and contacted Leininger's face but he was not sure. He later interviewed Leininger, who told a parallel story except that he denied bumping into Piasecki. He said that he was not hit hard and suffered no injury. Helgert testified that Leininger was significantly bigger than Piasecki.

Analysis and Conclusions

I find that the Respondent has established that it had a good-faith belief that Piasecki was guilty of serious misconduct, based on the police report and the statement of Leininger about the incident. Having observed his demeanor while testifying, I find no reason to doubt the testimony of Leininger that he was struck in the head by Piasecki. I also find no reason to credit the self-serving testimony of Piasecki, which appeared to be designed more to neutralize anything in

the police report about the incident that might be damaging to him, than to be a straightforward account of what occurred. According to Piasecki, once the confrontation (which he admittedly initiated by calling Leininger a "scab") escalated to the point where there was physical contact, it was caused by Leininger, who was the aggressor. It was Leininger who bumped into and forced Piasecki to push him away; thus, possibly causing one of Piasecki's hands to make contact with Leininger's head. If that were the case, it would be unlikely that Leininger would immediately flag down the police to report the incident. In any event, I did not believe his story.

I find that Piasecki's action in striking Leininger was coercive and intimidating and constituted serious misconduct under *Clear Pine Mouldings*, notwithstanding the fact that Leininger is bigger than Piasecki and he was not injured by the blow. Counsel for the General Counsel have not established by a preponderance of the evidence that Piasecki did not commit an unprovoked assault on Leininger and have not proved that his discharge violated the Act. I shall recommend that this allegation be dismissed.

25. Discharge of Frank Prainito

Frank Prainito has been employed by the DNA as a mailer since the JOA. Before that he had worked for the News since 1979. He is a member of Teamsters Local 2040. He went on strike on July 13, 1995, and has not returned to work. He testified that he did picketing during the strike. By letter, dated April 18, 1996, he was informed that he had been discharged for throwing star nails in the path of DNA newspaper carriers in Clinton Township, Michigan, on January 12, 1996.

Kelleher testified that he made the decision to discharge Prainito after reviewing documents relating to the incident. The documents were (1) a copy of the photo identification card of Frank Prainito; (2) a DNA Incident Report, dated January 12, 1996, concerning star nails being thrown from a vehicle in front of the vehicle of a DNA carrier; (3) a report identifying a vehicle, a green Saturn, and license plate, "122HPC," registered to Frank Prainito; and (4) a Clinton Township Police Department Report, dated January 12, 1996, in which carriers Kenneth and Griffin Schmuckel identified Prainito as the person who threw star nails in front of their vehicle on that date. Based on the information in these documents, Kelleher concluded that Prainito had followed the carriers' vehicle while they went about their business and had used star nails in an attempt to interfere with their doing so and that this was grounds for discharge.

Frank Prainito testified that on the morning of January 12, 1996, it was snowing heavily.[70] He got up about 5 a.m. to make coffee for his wife who had to be at work early that day. As his wife drove away from their house, heading North towards Hall Road, he saw the carriers' vehicle pass her going in the opposite direction and saw that vehicle's brake lights come on. This caused him to fear for his wife's safety, apparently because in November 1995 he had twice found star nails in his tires after backing out of his driveway. He called his wife on her car phone but got no answer. He got dressed, got in his green Saturn, and followed her route to work, to assure himself that she was all right. As he drove North towards Hall Road, he saw the carriers' van pass him going

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[70] No other witness confirmed this. However, it is interesting to note that the star nails the police found that day were painted white, apparently, to camouflage them in the snow.

Southbound. This convinced him that everything was all right and he turned east to return to his home. He saw the carriers' van turn around in a driveway and come after him, pursuing him, right on his tail, all the way to his home. This worried him because there were two of them and only one of him. As he pulled into his driveway, he heard something in his left front tire. He ran into his house and called the police. The dispatcher told him to look outside because the police were already on the way to his house. When he looked out he saw the police and the carriers. The police asked permission to search his vehicle and garage which he granted, but they found nothing. He found what looked like part of a white star nail in his tire but did not file a complaint about it because "it was no big deal." He, however, was charged with malicious destruction of property under $100 and pled not guilty. He implied that the charge had not been resolved as of the date he testified. He denied that he had thrown any star nails that morning.

Kenneth Schmuckel is an independent contractor who delivers newspapers for the DNA. He testified that on January 12, 1996, he and his son were delivering newspapers in the Rivergate subdivision in Clinton Township. At about 5:30 a.m., he saw a green car pass them and recognized the driver as an ex-employee of the DNA who lived in the subdivision and whom he later learned was Frank Prainito. About 10 or 15 minutes later, when they got to Highgate St., he saw the same green car approaching them. He saw the driver throw something towards their vehicle. He told his son who was driving to turn around and follow the car so they could get its license number. He called the police on his mobile phone and reported the car and license number. The police dispatcher told them to follow the vehicle and they continued to report the location of the vehicle to the police. While following the car through the streets of the subdivision, it circled back and

drove through the area of the same street where he had seen the driver throw something. At that point, he could see star nails in the street and they moved to the side to avoid them. They followed the car until it pulled into a driveway of a residence and entered the garage. They waited in the street until the police arrived. He told an officer named Richardson what had happened and saw police officers speaking to Prainito and looking at things in his garage. Officer Richardson returned and asked to look through his vehicle for star nails, but found none. He and the police examined his vehicle with flashlights but could see no damage on the gray van which had slush on it. He later accompanied the police officers to Highgate Street. to show them where the star nails were thrown. When they arrived, he pointed out approximately 10 star nails in the street. Later that morning, he found some damage to the rear quarter panel of his vehicle and one of the tires was flat. A piece of a star nail had gone through the sidewall of the tire and it could not be repaired.

Griffin Schmuckel testified that he was driving his father's van as they delivered newspapers that morning and that he saw a green Saturn driving in the neighborhood. As he turned down a street, whose name he could not recall, the green Saturn approached them. He saw the driver throw star nails out his window onto the street and heard a bunch of them hit their vehicle. He turned the vehicle around and followed the Saturn while his father called the police. They continued to follow the car which eventually led them back to the area where he had seen the star nails thrown. He could see star nails in the street and had to veer to avoid them, but the Saturn drove straight through them. They followed the Saturn until it entered a driveway and, as it did, he noticed one its front tires was almost flat. He testified that it was snowing that morning but that the streets were clear of snow. He and

his father later showed the police where the star nails had been thrown in the street.

Kenneth Richardson is a patrol officer with the Clinton Township Police Department. On January 12, 1996, he was dispatched to meet the parties who had reported being followed and having objects thrown at their vehicle. When he met the Schmuckels outside the home of the suspect, they reported that the driver of a green Saturn had followed them and had thrown what appeared to be star nails at their vehicle and that they had turned around and followed him to his home. Prainito opened his garage door and invited the police officers in. He observed what appeared to be a portion of a star nail in Prainito's right front tire. He also saw what appeared to be star nails on a board on the floor of the garage. He searched both the Prainito and Schmuckel vehicles but did not find any star nails in either. He went with the Schmuckels to the scene where they gathered up about 9 star nails and one broken one that had been painted white. He said that he was asked to bring them to the hearing but they had been disposed of after the criminal case was closed.

Analysis and Conclusions

Again, the Respondent contends that the Board's *Rubin Bros.* analysis should not be applied in this case because Prainito's alleged actions did not occur at or near a picket line and he was not engaged in protected activity at the time of this incident. However, it is the alleged discriminatee's status as a striking employee at the time of his discharge, not the location or nature of the incident for which he was discharged, that determines whether or not *Rubin Bros.* applies. Here, Prainito went on strike and had not returned to work at the time of his discharge. I find that the incident was strike-related, that the Respondent considered Prainito to be

a striker, and that it handled the matter according to the procedures it had set up for reporting, investigating and taking action on incidents of alleged strike misconduct.

I find that the Respondent had a good-faith belief that Prainito had attempted to damage a carrier's vehicle by throwing star nails under its tires and that this constituted serious misconduct that warranted discharge. See *Beaird Industries*, supra. I also find that the General Counsel has failed to show that Prainito did not engage in the misconduct for which he was discharged.

This is a matter of credibility. On one side, there is the credible and mutually corroborative testimony of the Schmuckels, which is further supported in many respects by the credible testimony of Officer Richardson. On the other, is the self-serving testimony of Prainito, which I found to be unbelievable and to make no sense. According to Prainito, he was so concerned when he saw the brake lights of the carriers' vehicle come on as it passed his house at the same time his wife was leaving for work, that he feared for her safety. The question that immediately comes to mind is, "Why?" Nothing in his testimony gives a clue. There is nothing to suggest that the carriers had ever threatened him or his wife at any time before.[71] At most, there is his unsupported claim that sometime during the previous November he had found star nails in his tires after leaving his

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[71] The only evidence that they even knew who Prainito was comes from the Schmuckels. Both testified that, while delivering papers in that neighborhood during the previous summer, around the time the strike began, Prainito had verbally abused them. There is no evidence that they responded in kind or ever threatened Prainito. They had not encountered him for months prior to this incident.

driveway. This, he implied, may have been the handiwork of these carriers or the Respondent's security guards. He gave no explanation as to why he believed this. The event that allegedly triggered his fear that morning was seeing the carriers' brake lights come on. The evidence is that, in January 1996, the carriers were delivering approximately 650 newspapers on weekday mornings, leading one to believe that their brake lights probably came on several hundred times. This was hardly a sinister event. Moreover, they were headed in the opposite direction from Prainito's wife. There is no evidence that he saw them turn around or pursue her.

In Prainito's story, what happened next makes even less sense. After being unable to reach his wife on her car phone, he rushed out to follow her route to work. Yet, during his pursuit of his wife's vehicle, as soon as he saw the carriers' vehicle coming towards him, he broke off his pursuit and turned to go home, allegedly, because "my mental thing was I was all right with it, because my wife was home." Even if he meant to say "home free," the question is why was he all right with it? For all he knew, his wife's car was a block or two ahead with tires full of star nails or other damage. His story was, in a word, ludicrous. Fortunately, judges aren't required to be any more naive than the next person. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). I observed and listened to him testify, and I did not believe him.[72]

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[72] Prainito also testified about another incident on August 13, 1996, near the News building, for which he was discharged a second time. The incident is discussed above in connection with the discharge of Steve Montagne. His discharge for that incident is not being contested as a part of this consolidated proceeding. I found his testimony about that incident was also incredible and that it casts additional doubt on his veracity.

Based on the credible testimony of the Schmuckels, I find that on the morning of January 13, 1996, without provocation, Prainito sought them out as they delivered newspapers in the subdivision where he lived. Once he found them and was in a position to do so, he threw at least 10 star nails out of the window of his vehicle into the path of their vehicle as it passed by. One of the nails did in fact damage a tire on the Schmuckels' vehicle and another damaged one on Prainito's own vehicle when he drove back over the same street.[73] The testimony of Richardson confirms that, shortly after the incident, the police found numerous star nails in the area where the Schmuckels saw Prainito throw them. Having found that counsel for the General Counsel have not shown that Prainito did not engage in the misconduct for which he was discharged and have not proved a violation of the Act, I shall recommend that this allegation be dismissed.

26. Discharge of Reinaldo Ramos

Reinaldo Ramos has been employed by the DNA as a district manager since the JOA. He had previously worked for The Free Press, beginning in 1985. He is a member of Teamsters Local 372. He went on strike on July 13, 1995, and has not returned to work. During the strike, he picketed at a number of locations. By letter dated September 18, 1996, he was informed that he had been discharged for spitting on and harassing a DNA employee as he exited 615 W. Lafayette on March 14, 1996.

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[73] It might be argued that this is evidence that Prainito did not throw the star nails on Highgate Street because a person would be unlikely to drive through the same area shortly after having done so. Considering all the circumstances surrounding this incident, I do not find it to be a persuasive argument.

Kelleher testified that he made the decision to discharge Ramos after reviewing a number of documents. The documents were (1) a DNA incident report by Dan Pearson describing being verbally abused and spat on outside The News building on March 14, 1996; (2) a DNA incident report by security guard Milton Crosson stating that he saw Pearson spat on outside The News building on March 14, 1996; (3) a copy of the photo identification card of Reinaldo Ramos; (4) an unsworn affidavit of Milton Crosson, dated May 15, 1996, stating that the person who spat on Pearson on March 14, 1996 had been photo-identified by Pearson and himself as Reinaldo Ramos; (5) an unsworn affidavit of Daniel Pearson, dated May 21, 1996, describing the incident on March 14, 1996 and stating that he had photo-identified Reinaldo Ramos as the person who spat on him that date; (6) an unsworn affidavit of Daniel Pearson, dated September 18, 1996, stating additional details of the incident on March 14, 1996; (7) a DNA Investigations report, dated March 14, 1996, describing the incident on March 14, 1996, the photographing of Ramos, and the identification of Ramos by Pearson and Crosson as the person who spat on Pearson on that date; and (8) a photograph of Reinaldo Ramos. Based on the information in these documents, Kelleher concluded that Ramos had verbally assaulted Pearson and spat on him when he exited The News building and that he should be discharged.

Daniel Pearson testified that in 1996 he was employed by the DNA as a sales representative had continued to work during the strike. On March 14, 1996, he left work at The News building after 5 p.m. As he walked along the front of the building, a person whom he identified from photographs in the record as Ramos, walked along beside him, calling him "a scab piece of shit." As he was about to turn the corner onto Second Street, Ramos dropped behind and he heard a spitting noise and saw particles fly over his head. After

walking another seven or eight steps on Second Street, Pearson turned around and saw Ramos who referred to the spittle on his back and said he hoped Pearson had "fun at the dry cleaners." When he got to the parking garage he examined his coat which had spittle on the back of it. He also testified that he did not actually see Ramos spit at him and that there were two other pickets standing at the corner when the spitting occurred. When he turned around and looked back, Ramos was about seven steps behind him and the two pickets on the corner were about 9 or 10 feet behind him.

Security guard Milton Crosson testified that on March 14, 1996, he was standing in the front lobby of the News building looking out the window when he observed Ramos spit on the back of Pearson's jacket. He said that he was standing a few feet inside the second window away from the corner of Second Street and saw Ramos spit on Pearson "almost right in front of the window," close to the ramp by the entrance. Ramos continued to follow Pearson and they went out of his sight. He testified that he took a photograph of Ramos immediately after the incident.[74]

Ramos testified that he was present at a rally outside The News building on March 14, 1996, for about 2 hours, beginning about 4 p.m. There were about 200 to 300 people at the rally that day and he walked around carrying a picket sign. When he encountered replacement workers or crossovers, he called them "scabs, fucking scabs and stuff like that." He said that he does not know who Dan Pearson is and did not spit on anyone that day or spit in the direction of anyone. He denied that he had ever said anything about

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[74] The photograph of Ramos in the record indicates that it was taken at 5:25 p.m. on the 14th of the month.

spitting or about going to a dry cleaner to Pearson or anyone else that day.

Analysis and Conclusions

I find that Ramos was on strike at the time of this incident, that the incident occurred at or near a picket line, and that the Respondent considered him to be a striker. I also find that the Respondent has established that it had a good faith belief that Ramos had spit on Pearson as he was leaving work on March 14, 1996, based on the statements of Pearson and Crosson. His doing so was coercive and intimidating and constituted serious misconduct under *Clear Pine Mouldings*.

I also find that the General Counsel has not established that Ramos did not spit on Pearson. I find no reason to believe that either Crosson or Pearson fabricated the incidents to which they testified or that they were mistaken in their identification of Ramos as the perpetrator. It is clear that they have described 2 different spitting incidents, as by his own admission, it would not have been possible for Crosson to have seen as far as the corner of Second Street from where he was standing in the lobby of the building.[75] However, either was sufficient to justify the Respondent's discharge of Ramos. I found Pearson to be a believable witness and credit his testimony about what he heard and observed. His testimony establishes that he was spat upon as he was being followed and verbally harassed by Ramos. Although he did not see Ramos, who was behind him at that point, actually do the spitting, there is strong circumstantial evidence that he did it,

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[75] Crosson's testimony that, when he saw Ramos spit on him Pearson did not appear to realize that it had happened, is consistent with there being 2 distinct spitting incidents.

i.e., Ramos had been walking along beside him, calling him names, and Pearson was spat on at the corner immediately after Ramos dropped behind him. When he turned around, Ramos was the closest person to him and teased him about it and his needing to go to the dry cleaners. I also find no reason to doubt Crosson's testimony about seeing Ramos spit on Pearson in front of the building. If he had not seen it, there would have been no reason for him to have immediately photographed Ramos at the scene. The only contrary evidence is Ramos' self-serving testimony that he did not do it. Given the convincing evidence that he did, I find that counsel for the General Counsel have not proved a violation of the Act by a preponderance of the evidence. I shall recommend that this allegation be dismissed.

27. Discharges of James Ritchie

James Ritchie has been employed by the DNA since the JOA as a mailer. He previously worked for the News, beginning in 1983. He is a member of Teamsters Local 2040. He went on strike on July 13, 1995, and has not returned to work. By letter, dated August 2, 1996, he was informed that he was being discharged for cutting a telephone line to a DNA guard shack at Fort and Second Streets and spitting on DNA security personnel at the same location on April 3, 1996. By letter, dated September 18, 1996, Ritchie was informed that he was being discharged again on the separate and distinct grounds that he used threats and sexual and racial slurs to an employee as she exited the North Plant on August 29, 1996.

a. *The April 3, 1996, Incident*

Kelleher testified that he made the decision to discharge Ritchie for the April 3, 1996 incident after reviewing certain documents and a videotape. The documents were (1) a copy

of Ritchie's photo identification card; (2) a DNA-APT report, dated April 3, 1996, by Reginald White, stating that he had seen an unidentified striker cut a telephone wire leading from the guard shack in parking lot # 4 near The News building; (3) an unsworn affidavit of Reginald White, dated July 26, 1996, describing the incident in which the wire was cut, stating that later the same day the same person spit on him, hitting him in the face and chest at least 3 times, and identifying the person from an identification badge as James Ritchie; (4) an unsworn affidavit of James Hattis, dated May 31, 1996, identifying the person shown in the videotape taken on April 3, 1996, as Ritchie, a person he has known for about 15 years; and (5) a note from George Plagens indicating the cost of repairing a telephone line in Parking Lot # 4 as being $ 40.68. Based on the information in these materials, he believed that Ritchie had vandalized DNA property by cutting a telephone wire, that he had spit on a security guard, and that these actions were unprotected and warranted discharge.

Reginald White testified that on April 3, 1996, he was employed by APT as a security guard and was assigned to the parking lot while a rally was going on. As he was videotaping, he saw out of the corner of his eye, a large man wearing leather gloves, an orange vest, and a ball cap turned backwards, who made a cutting motion with what appeared to be wire cutters. As he turned the camera onto the man, he let go of the wire he had cut and was holding in his hands. Later in the day, while he was videotaping a female picketer near the guard shack, the same man spit on his face and chest several times from about 4 feet away.

James Ritchie testified that he attended a rally outside The News building on April 3, 1996. He said that, as he approached the fence of the parking lot, he noticed a wire hanging on the top of the fence. He took the wire in his hands

and said, "look, someone already cut these wires." He let go of the wire and walked away. He identified himself as the person shown in the video standing near the fence wearing an orange vest and holding the wire, but denied that he had cut it or that he had any tool in his hands that day. He also identified himself as the person shown spitting over the fence onto a parked car, but he denied that he spat on a security guard. On cross-examination, he admitted that he had spit in the "general direction" of a security guard but believed he did not come close to hitting him.

Analysis and Conclusions

I find that the Respondent has established that it had a good-faith belief, based on the statements of security guard White and the videotape, that Ritchie had engaged in serious misconduct under *Clear Pine Mouldings*, in that it has reason to believe that he had vandalized its property by cutting a telephone wire and that he had spit on a security guard.

Having observed his demeanor while testifying, I have no reason to doubt that White was telling the truth when he said that he saw Ritchie cut the telephone wire on April 3, 1996, or that Ritchie spat on him later that same day. Although it does not catch Ritchie in the act of cutting the wire, the videotape does show him holding the wire and is consistent with White's testimony about what he observed. The videotape does clearly show Ritchie in the act of spitting over the fence towards White who is holding the camera. While it does not depict the actual incident in which White was spat upon, it shows Ritchie's willingness to deliberately spit at the security guards. I credit White's testimony over the transparent, self-serving claims by Ritchie that he merely held up the severed wire and commented that it had *already* been cut and that, while he had spit in the general direction of the

security guard, he did not hit him. Under the circumstances, there was no apparent reason for Ritchie to have picked up the wire in his hands and he offered none in his testimony. I find that counsel for the General Counsel have not established by a preponderance of the evidence that Ritchie did not engage in serious misconduct on April 3, 1996, or that his discharge on that basis was unlawful.

b. The August 29, 1996 Incident

Kelleher testified that he made the decision to discharge Ritchie for the August 29, 1996 incident after reviewing certain documents. The documents were (1) an unsworn affidavit by Nancy Townsend concerning an incident at the picket line at the North Plant, on August 29, 1996, in which two picketers blocked her from exiting, one of whom she identified as Ritchie from a photo, quoted Ritchie as calling her a "fucking nigger loving bitch whore" and saying that she was responsible for "the niggers taking their jobs," and "I hope your children die," and "Before your family dies, I hope you tell them you are responsible for white America losing their jobs to the niggers;" (2) an Employee Incident Report by Nancy Townsend describing the incident on August 29, 1996; (3) a DNA Investigations report describing the complaint by Nancy Townsend about the August 29, 1996 incident. Based on these materials, he believed that Ritchie had blocked Townsend from exiting the facility, that he had made the comments attributed to him by Townsend, and that these actions were unprotected and warranted discharge.

Nancy Townsend testified that she is employed by the DNA as a sales representative, a job she has had for over 23 years. On the evening of August 29, 1996, as she was exiting the North Plant, she blew her horn at 2 picketers who were standing in front of her car. As she moved past them and was

waiting for traffic on the road to pass, the one whom she identified at the hearing from a photograph as James Ritchie, started calling her names and threatened that her family was going to be killed. He said things like: "You fuckin' bitch, nigger lovin' whore. It's your fault that white America lost their jobs. Your family is going to die. I hope you tell your children before they die that its your fault and its because you gave our jobs away." She said that she had no doubt about her identification of Ritchie and that, while she was not personally acquainted with him, she had seen him before in the plant cafeteria.

Ritchie denied that he was picketing at the North Plant on August 29, 1996, and that he had made any threats or used any sexual or racial slurs to an employee exiting the plant that day. He said that he had "probably" left to go up to his property in Marlette, Michigan, that day. He said that he does not use the term "nigger" and would not say to anyone that he hoped their children die because he has children of his own. Ritchie's wife, Julie, testified that he was at home with her on Thursday, August 29, 1996, until about noon. Then, he and their 2 sons left to go to Marlette. She next saw him in Marlette when she arrived there about 8 p.m. that night. Ritchie's father-in-law, William Johnson, testified that, on August 29, 1996, he was at the farm in Marlette when Ritchie and his 2 sons arrived there in the late morning or early afternoon. He also testified that Ritchie's wife and her 2 daughters came up to the farm on the following day, Friday.

Analysis and Conclusions

I find that the Respondent has established that it had a good-faith belief, based on the statements of Townsend, that Ritchie was the person who spoke to her on August 29, 1996, and that he made the statements she attributed to him.

I have no reason to doubt the credible testimony of Townsend that Ritchie was the person who verbally accosted her at the North Plant on August 29, 1996. Considering his demeanor and his testimony as a whole, I did not believe Ritchie's half-hearted, self-serving denial that he was not there because he "probably" went to Marlette that day or that he would not have said such things. I also do not credit the contradictory testimony of Julie Ritchie and Johnson concerning Ritchie's going to Marlette. According to Julie, she and her daughters traveled to Marlette later the same day that her husband did, while Johnson claimed Ritchie came to Marlette the day before they did. While they agreed on the substance of the alibi, they didn't get the details straight.

Considering all the evidence, I credit Townsend's testimony identifying Ritchie as being at the North Plant on August 29. However, I find that there are not enough details concerning the alleged blocking of her vehicle to establish that it involved significant interference with her attempt to exit the facility. Moreover, it is clear that the thrust of her complaint, and the Respondent's stated grounds for the discharge, was what Ritchie said during the incident not that she was prevented from exiting.[76]

While there is no doubt but that what Ritchie said to Townsend was clearly offensive and reprehensible under any objective standard, it does not constitute grounds for discharge under *Clear Pine Mouldings*. As has been discussed above, the Board has found a striker's use of even the most

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[76] There is no evidence that any disciplinary action was taken against or that any effort was made to identify the other picketer who was standing next to Ritchie when Townsend was exiting the North Plant.

vile language and/or gestures, standing alone, does not forfeit the protection of the Act, so long as those actions do not constitute a threat. See *Nickell Moulding*, supra, and the cases discussed therein. There is no evidence that this anything but a one-time chance encounter. Although Townsend testified that she felt that Ritchie had threatened to harm her family, given the written statements she provided the Respondent immediately after the incident, I find that was her subjective analysis of his statements, not what Ritchie actually said. At the hearing, she testified that Ritchie said, "Your family is going to die," and that she "took that to mean . . . when they get killed, its going to be . . . [my] fault." In her written statements, given much closer in time to the event, she quoted Ritchie as saying: "I hope your children die" and her "children should die." I find that this does not constitute a threat by Ritchie that he, personally, would harm Townsend's children, particularly, where there is no evidence that they were acquainted and no reason to believe Ritchie even knew whether she had children. Although I find that Ritchie's comments did not constitute grounds for discharge, I find no violation of the Act inasmuch as he had already been lawfully terminated before the letter of September 18, 1996, was sent.

28. Discharge of Jerome Robertson

Jerome Robertson has been employed by the DNA as a single copy driver. Prior to the JOA, he had worked for the News since November 1973. He is a member of Teamsters Local 372. He went on strike on July 13, 1995, and has not returned to work. By letter, dated August 2, 1996, he was informed that he was being discharged for vandalizing a DNA news rack and stealing a paper from that rack in Detroit on March 29, 1996.

Kelleher testified that he made the decision to discharge Robertson after reviewing documents concerning the incident. The documents were (1) an unsworn affidavit of John Lyman, dated April 4, 1996, concerning his identification of Robertson as the person he saw take a newspaper from and foul a rack on March 29, 1996; (2) a copy of the photo identification card of Jerome Robertson; (3) a DNA-APT Incident Report, dated March 29, 1996, concerning a person who used an instrument to open a rack and steal a newspaper and to "foul the rack," located in front of a McDonald's and the identification of the person's vehicle; (4) a report identifying a gray Chevrolet pickup with Michigan license tag, LK2556, as belonging to Robertson; (5) a photograph, dated March 29, 1996, of a person walking near a Free Press rack in front of a McDonald's; and (6) a photograph, dated March 29, 1996, of the rear of a pickup with license tag LK2556. Based on the information in these documents, Kelleher concluded that Robertson had been positively identified as the person who went to a rack, opened it using a tool and removed a newspaper without paying for it and also used the tool to "foul the rack" so that it could not be used. Based on these conclusions, he terminated Robertson.

Jerome Robertson testified that on the morning of March 29, 1996, he was returning from the Windsor Casino with an elderly relative. The relative, who is since deceased, asked where she could check the results of the Ohio lottery because she had purchased some tickets before coming from her home in Dayton, Ohio. He told her the only way was to buy a "scab newspaper" which he had not done since the strike began. However, he agreed to get her one and pulled into a McDonald's where he knew there was a rack. As he parked his vehicle, he noticed a white Dodge similar to those used by the DNA's security guards, that there were guards sitting in the vehicle facing the rack, and that they had a camera sitting

up in the window. He sat in his vehicle for awhile debating whether he should go near the rack. He finally got out and held up 35 cents to the guards as he approached the Free Press rack. He put his money in the rack and it did not work. He pushed the return button, got his money back, held it up, went to the News rack, put the money in, opened the rack, and took out the last remaining newspaper. By then, one guard was hanging out of the car with a camera. He got in his truck and, as he pulled away, gave the finger to the guard with the camera who was outside of the car at that point. He testified that he had a DNA employee sticker on his window as well as some strike-related stickers on his truck. He said that he did not vandalize a rack and that he paid for the newspaper he took from the rack. On cross-examination, he said he was not sure which rack worked and which did not and that he may have purchased a Free Press rather than a News. He said that, as a single copy driver, he was familiar with a key that is used to open racks but not a tool.

John Lyman testified that he was employed by APT as a security guard on March 29 1996, and was assigned to watch newspaper racks near a McDonald's that had been vandalized and from which newspapers were reported missing. He arrived before sunrise and, once the newspapers were delivered, he checked the racks to see that they were operating. He testified that, while he was watching the racks, an African-American gentleman, whom he identified as Robertson, "came in and messed up one of the racks." He arrived in a gray pickup shortly after the papers were delivered. He looked at Lyman and gave him the finger. Lyman testified that Robertson, "started putting something into the coin or key slot, something like that, I don't recall exactly. But, anyhow, he made a big to-do about it and I took some pictures as it was occurring and then I went over and checked the machine and it was fouled."

Analysis and Conclusions

I find that the Board's *Rubin Bros.* analysis is applicable to Robertson's discharge regardless of the fact that there was no picketing or other formal strike-related activity going on at the time of this incident. Robertson went on strike and had not returned to work at the time he was discharged. I find that the Respondent considered Robertson to be a striker and that it handled the matter according to the procedures it had set up for reporting, investigating and taking action on incidents of alleged strike misconduct. I also find that, on the basis of the reports submitted by Lyman in March and April 1996, the Respondent had a good-faith belief that Robertson had stolen a newspaper and had damaged one of its newspaper racks. The latter action, at least, would constitute serious misconduct and be grounds for discharge.

I also find that the evidence as a whole establishes that Robertson did not engage in the misconduct for which he was discharged. There is no doubt that Robertson was present at the McDonald's on the morning of March 29, 1996. He admits being there. There is no doubt that one of the racks located there was not working properly. Robertson testified to that fact. There is also no doubt but that he was aware that he was being observed throughout the entire incident by security guards with a camera. Robertson testified that he purchased a newspaper that morning and that he did not damage the racks. His testimony was detailed and plausible. I found him to be a believable witness and credit his testimony because (1) I find it hard to believe that under these circumstances he would openly steal a newspaper and vandalize a rack; and (2) I find there is no persuasive or credible evidence that he did so.

The only evidence to the contrary is the testimony of Lyman. Even if he were to be believed, Lyman's vague, conclusory testimony about this incident is insufficient to establish that Robertson engaged in misconduct. Kelleher testified that he discharged Robertson because he used an instrument to open a rack and steal a newspaper and to vandalize the rack so that it could not be used. First, Lyman did not testify to seeing Robertson steal a newspaper from a rack that morning. His limited testimony about what he did see does not contradict Robertson. He testified only that he saw Robertson put "something into the coin or key slot, something like that," but he couldn't recall what Robertson put in or which slot he put it in. In fact, Lyman's testimony is consistent with that of Robertson that he put 35 cents in the rack to purchase a newspaper. As for the vandalism, Lyman testified only that Robertson "messed up one of the racks" and that when he checked a rack after Robertson left, "it was fouled." I find this testimony is so ambiguous and lacking in detail that it fails to establish which rack Robertson is alleged to have damaged, what the damage was, or how he did it. Lyman's testimony makes no reference to Robertson having or using any kind of "instrument." Moreover, it fails to contradict Robertson's testimony that one of the racks was not working when he tried to use it. Lyman claimed that Robertson arrived immediately after the newspapers were delivered, which implied that it was immediately after Lyman had examined the racks to assure that they were working properly. However, the evidence shows that the newspaper Robertson purchased was in the face plate of the rack and was the last one. Obviously, some number of customers approached and used the racks that morning before Robertson did. There is no evidence that Lyman checked the racks after any, let alone all, of them. Robertson credibly testified that the first rack he tried wouldn't work and he retrieved his coins and used the other one. Even if Lyman did find a rack

that was "fouled" that morning, as Robertson had, the evidence does not establish that Robertson was responsible for it.

Having observed his demeanor while testifying, I did not find Lyman to be a credible witness. He appeared to have little recollection of the incident as a whole and none as to the details.[77] More important, he testified that Robertson was around the racks for some "minutes" during the incident and that he had taken "some pictures as it was occurring," implying, that he had photographed Robertson damaging the rack. No such photos were introduced. There is only one photo in the record concerning this incident which shows a rack. In it, a man, who has not been identified, is shown walking a few feet away from the rack with his back towards it. The only thing it proves is that Lyman's misleading testimony cannot be believed.

Considering all of the foregoing, I infer that Lyman fabricated the report that he had seen Robertson steal a newspaper and damage a rack to retaliate against Robertson, whom he knew was a strike supporter, probably because Robertson gave him the finger that morning. In any event, I find there is no credible evidence that Robertson stole a newspaper or damaged a rack on March 29, 1996. Based on the credible testimony of Robertson, I find that the General Counsel has established by a preponderance of the evidence that Robertson did not engage in the misconduct for which he was discharged. Accordingly, I find that his discharge violated Section 8(a)(3) and (1).

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[77] In contrast, Robertson gave a detailed account of his actions while at the McDonald's that morning. Lyman's testimony contradicted almost none of it.

29. Discharge of Samuel Rodriguez

Samuel Rodriguez has been employed by the DNA, since the JOA, as a trucking dispatcher at the North Plant. He had previously worked for The Free Press, beginning in March 1983. He is a member of Teamsters Local 372. He went on strike on July 13, 1995, and has not returned to work. He testified that he did picketing and leafleting during the strike. By letter, dated February 2, 1996, he was informed that he was being discharged for keying the side of a vehicle as it was exiting the Centerline Distribution Center on September 21, 1995.[78]

Kelleher testified that he made the decision to discharge Rodriguez after reviewing a number of documents. The documents were (1) a DNA/APT Incident Report, dated September 21, 1995, by Loyd Garcia, stating that on that date while driving through a picket line he saw one of the pickets lean down and extend his left hand, that he heard a scraping sound, that he backed up his vehicle and saw an 8-inch scratch on the driver's side door, and that he pointed out the picket to the police; (2) a copy of the photo identification card of Samuel Rodriguez; (3) a Centerline Department of Public Safety Report, dated September 22, 1995, by Officer Kenneth Frizzell, concerning a report of damage to a vehicle as it crossed the picket line on September 21 and the identification of Rodriguez as the perpetrator by Garcia; (4) an unsworn affidavit of Ramiro Ramirez, dated November 16, 1995, concerning the incident and his identification of Rodriguez the person who leaned towards the vehicle and extended his left

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[78] Although the letter refers of the incident as occurring on September 21, 1996, there is no dispute but that was a typographical error and that the year was 1995.

hand before he heard a scraping sound; (5) an unsworn affidavit of Loyd Garcia, dated November 9, 1995, concerning the incident on September 21, 1995; and (6) a photograph of a scratch on the driver's side door of a red Taurus. Based on the information in these documents, Kelleher concluded that Rodriguez had been identified as the person who had scratched the side of the security guards' vehicle as it exited the distribution center and that he should be terminated.

Rodriguez testified that he was picketing with about 25 others at the Centerline Distribution Center on September 21, 1995, beginning at midnight. About 2 a.m., a car with two security guards inside passed through the picket line. He was holding a picket sign with both hands as it passed about 6 to 12 inches from where he was standing. He stooped down, looked the driver in the eye, and called him a "scab piece of shit." He testified that when he did so, he kept both hands on his picket sign. The driver immediately stopped, backed up onto the company's property, got out, and looked down at the door. He then motioned to the police officers that were nearby to come over. After they did so, the guard pointed in his direction and a police officer came over to him and took him to his police car. The police officer frisked him and asked him what he had in his pockets. He took off the welding gloves he was wearing because of the cold and reached into his blue jeans and took out his keys. The police officer told him that he was accused of scratching the security guards' car, which he denied. He sat in the police car while the officer checked his identification over his radio. The police officer told that if he did not hear anything in the next 2 weeks, to forget about it. He returned to the picket line and continued picketing. He was never charged with a crime because of the incident. He testified that he did not scratch the vehicle and did not see anyone else do so.

Loyd Garcia testified that in September 1995 he was employed by APT. On the night of September 21, as he was driving through the picket line at the Centerline Distribution Center, he saw a picketer, whom he recognized as one that often spat at vehicles, close to the driver's side of his vehicle. The picketer had his right hand near the window and reached down with his left hand. As he did so, Garcia heard a scratching sound. He backed up onto the distribution center property and found a big scratch on the side of the car. He called over the police officer that was on duty there and identified Rodriguez to him. He testified that Rodriguez was the only person within an arm's distance of the car when he heard the scratching noise and that his left hand was near the area where the scratch was found. At the hearing, Garcia identified a photo of Rodriguez as the person who he saw near the car. He also testified that earlier the same night, as he entered the distribution center, an unidentified picketer had kicked the side of his vehicle. He had reported this to the police officer that was on duty nearby. He had examined the vehicle at that time and there was no scratch on the driver's side door. He did not recall if Rodriguez was wearing gloves that night.

Kenneth Frizzell is a public safety officer for the city of Centerline and was on duty at the distribution center on September 21, 1995. He testified that there were 2 incidents involving the same vehicle that night. In the first, as the vehicle pulled in, it bumped a striker who kicked it. As a result, he had questioned the striker and examined the entire vehicle and saw no damage other than a small dent caused by the kick. About 30 minutes later, the same vehicle exited the facility. He observed the vehicle approach the picket line and, after passing about halfway through, it stopped and backed up. The driver got out and told him that someone had scratched the vehicle. He inspected the vehicle and saw a 12-

inch scratch on the driver's side. The driver pointed out Rodriguez to him, as the individual who damaged the vehicle. He questioned Rodriguez, who denied having done it. Frizzell was on the passenger side of the vehicle when the incident occurred. He did not see Rodriguez scratch it but did see him on the driver's side of the vehicle along with five to eight others. He did not find any sharp objects when he searched Rodriguez and could not recall if he had any keys on him. He did not see Rodriguez wearing welding gloves that night.

Michael Feeney testified that he has been an employee of the DNA since April 1995 and is a member of Teamsters Local 372. He was on strike from July 13, 1995 until the unconditional offer to return to work in February 1997. He is a co-worker of Rodriguez and was picketing with him on September 21, 1995, at the Centerline Distribution Center where he was the picket captain. He said there were 10 to 20 pickets present at various times that night. He testified that when the security guards drove through the picket line in the red Taurus he was standing shoulder to shoulder with Rodriguez, who was immediately to his left. He saw the vehicle stop and back up. The occupants talked to a police officer for a while and pointed to the car. The police officer then came over and asked Rodriguez to go with him to his car. They talked for about 15 minutes and Rodriguez was released. He asked the police officer what was going on and was told that the driver claimed that Rodriguez had scratched his car. Feeney told the police officer that he and Rodriguez were the only 2 people in the driveway and that they had had not touched the car. He testified that if Rodriguez had scratched the car he would have seen him, that Rodriguez did not do it, and that he, Feeney, did not do it. On cross-examination, he said that he did not have Rodriguez in view every second but that he would have noticed if he had leaned or moved toward the vehicle. He specifically denied that there

were other picketers near the vehicle when this incident occurred, which he said was around midnight.

Analysis and Conclusions

I find that the Respondent has established that it had a good-faith belief that Rodriguez had scratched the security guards' vehicle. It had photographic evidence that the vehicle had been scratched that night. Although no one actually saw Rodriguez scratch the vehicle, the reports and affidavits of the 2 guards and Officer Frizzell constituted substantial circumstantial evidence that Rodriguez did it. All three identified him as being close to the car at the point when the guards said they heard the scratching noise and saw his left hand in the area where the damage occurred. Garcia's affidavit and Frizzell's report also indicated that they had inspected the vehicle in connection with another incident that night and the scratch was not there. I find this was sufficient to lead a reasonable person to believe that Rodriguez was responsible for the damage, which constituted serious misconduct under *Clear Pine Mouldings* and was grounds for discharge.

I also find that counsel for the General Counsel have not proved by a preponderance of the evidence that Rodriguez did not scratch the vehicle. Given his admission that he was in close proximity to the vehicle when the damage allegedly occurred, I find that Rodriguez' self-serving denial that he scratched the vehicle is insufficient to overcome the substantial circumstantial evidence that he did. I observed his demeanor while testifying about this and another incident, in July 1995, in which he claimed to have been struck by a carrier's vehicle as it crossed a picket line. I did not believe his testimony about either incident. Although Rodriguez claimed he was wearing bulky welding gloves that night for

warmth and implied this prevented him from reaching into his tight jeans pocket for his keys, the only thing in his possession that could have caused the damage, I did not believe him.[79] No one else who was present that night testified to seeing him with gloves on. He failed to mention it in an affidavit he gave to the Board and there is no evidence that he raised it with Officer Frizzell when he was questioned at the scene. Frizzell credibly testified that Rodriguez was not wearing gloves that night. In any event, there was nothing to prevent him from taking a glove off in order to take out his keys or to put them back.

If believed, the testimony of Feeney is strong evidence that Rodriguez did not scratch the guards' vehicle. Notwithstanding the fact that, as a current employee of the Respondent with no direct interest in this matter he would be unlikely to be untruthful, I do not credit his testimony.[80] Feeney said that the incident occurred at midnight, which would have been immediately after Rodriguez arrived. If, as he said, Feeney was in fact picketing with him that night, I would expect him to know that Rodriguez had been there for at least 2 hours before this incident, which occurred around 2 a.m. Other parts of Feeney's testimony do not corroborate that of Rodriguez. Feeney testified that he was wearing gloves that night to protect his hands against getting slivers from his

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[79] While there was conflicting evidence about the temperature that night, I do not consider it significant, as I find that the credible evidence fails to establish that Rodriguez was wearing gloves that night.

[80] The evidence as a whole indicates that, if Feeney was standing where he said he was when the car passed and Rodriguez did not scratch it, Feeney may have; thus, giving him a reason to try to exonerate Rodriguez.

picket sign stick, but he did not notice Rodriguez wearing any. Feeney also failed to corroborate Rodriguez' claim that, while he was near the guards' vehicle, he was holding a picket sign with both hands. In other significant respects, Feeney's testimony is contradicted by that of Rodriguez and/or Garcia and Frizzell. Feeney, who was a picket captain, said that he had never seen Rodriguez spit at any vehicles as they went through the picket line. Rodriguez admitted that he had a habit of spitting on cars as they went by him and both Garcia and Frizzell testified that Rodriguez was so well known for spitting on vehicles at the Centerline facility that he had been nicknamed "Louie the Luger" by the security guards. Finally, Feeney was adamant that, when the guards' vehicle approached them, only he and Rodriguez were on the driver's side of the vehicle, standing shoulder to shoulder. Rodriguez testified that there were five or six picketers on his side of the car when it approached him. Garcia and Frizzell both testified that there were other picketers on the same side of the car as Rodriguez.

Considering all of the evidence, I find that it does not establish that Rodriguez did not engage in the misconduct for which he was discharged. Therefore, counsel for the General Counsel have not proved that his discharge violated the Act. I shall recommend that this allegation be dismissed.

30. Discharge of Juan Sanchez

Juan Sanchez has been employed by the DNA since the JOA as a relief district manager. He had previously worked for The News beginning in May 1988. He is a member of Teamsters Local 372. He went on strike on July 13, 1995, and has not returned to work. He testified that during the strike he did picketing and leafleting, that he distributed "No News, No Free Press" signs to customers who supported the

strike, and that he talked to carriers, trying to persuade them not to deliver newspapers. By letter dated, December 20, 1995, he was informed that he was being discharged for threatening carriers with bodily harm during July, August, and October 1995.

Kelleher testified that he made the decision to discharge Sanchez after reviewing certain documents. The documents were (1) an affidavit of Sheila Varga, dated November 10, 1995, describing an incident on October 25, 1995, while she and her husband were delivering newspapers, in which Sanchez cursed at her husband, threatened to shoot him and blow up their house and car, and appeared in his doorway with a rifle; (2) an affidavit of John Varga, dated November 10, 1995, describing the same incident; (3) a Strike Incident Report, dated October 25, 1995, by John Varga, in which he describes an incident on that date where Sanchez threatened to shoot him, blow up his car and house, and displayed a shotgun; states that it was the third time that Sanchez had made such threats to him; and states that Sanchez had been following him around in his car; and (4) a copy of the photo identification card of Sanchez. Based on the information in these documents, Kelleher concluded that Sanchez had confronted the Vargas on a couple of occasions while they were delivering newspapers, that he had told them to stay out of the area, that he stood in his doorway with a shotgun, that he threatened to shoot them, and that he should be terminated.

John Varga testified that he has been a carrier delivering The News and The Free Press to homes since 1982. He testified that the day the strike started he was at "the Rosa Parks office on Porter" with his wife and was talking to some carriers when Sanchez pulled up and told him he had a bullet for him and was going to shoot him, then drove away. Another time while he was delivering newspapers near a party

store at Junction and Porter, Sanchez came up to him and asked him why he was delivering newspapers. When Varga responded "to feed my family," Sanchez said "I can shoot you" and "I have a gun for you." Varga told him to leave him alone and walked away. On October 25, 1999, Varga was delivering in Sanchez' neighborhood. He handed a newspaper to a customer 2 doors away from Sanchez' house. He was talking to the customer about the fact that he did not want the newspaper after his subscription expired because of the strike. As he was walking away, Sanchez came out and started harassing him, called him all kinds of names and, while doing so, pulled out a rifle. At the hearing, he identified a photo of Sanchez as the person who made all of these threats to him.

Varga's wife Sheila testified that she was with her husband during October 1995 while he was delivering a newspaper to a customer. She heard some hollering and saw a man in a doorway of a house 2 doors away from the customer's. The man, whom she identified at the hearing from a photo as Sanchez, had his hand on a shotgun. Sanchez said that he would shoot Varga and that he wanted him off the street. She said that Sanchez' wife came out and told him to give her the gun and that they should call the police and accuse Varga of littering. Varga told Sanchez to leave him alone, that he was just doing his job, but Sanchez kept threatening to shoot him. She said that this was the only incident involving her husband and Sanchez that she witnessed. She said that they have been delivering newspapers in that neighborhood for at least 5 years and have a good relationship with their customers; however, on cross-examination she was unable to name the customer to whom Varga was delivering just before she heard Sanchez threaten him.

Sanchez testified that he knew Varga as the carrier in his neighborhood who sometimes delivered the newspaper to his house on his days off. He said that one day while he was sitting in his living room, which had the window open, he heard Varga talking to his next-door neighbor Luis Garcia. Garcia said that he did not want the newspaper delivered because he was supporting the strike and Varga told him that he had to deliver it because it was prepaid. Sanchez went out onto his porch and told Varga not to deliver the newspaper to houses that had signs saying they did not want newspapers. Varga said he had to deliver it because it was prepaid. Sanchez told him that Garcia was upset and that he did not want the newspaper. Varga kept saying that he had to deliver the newspaper and came onto Sanchez' porch. Sanchez repeated that he should not deliver to people with signs on their lawns. Their conversation ended with Varga leaving the porch and saying that he would get Sanchez fired. Sanchez testified that he normally picketed at the Lincoln Park Distribution Center, but that on one occasion after the strike began he was driving by the Porter Street station, that he saw Varga there but did not stop or speak to him. He said that another morning, as he was taking his wife to work, he stopped at a stop sign as Varga was crossing the street. Varga waved at him and Sanchez told him not to deliver newspapers to people with signs on their lawns. Varga "got really hot," told him to mind his own business, and asked if he wanted to fight. Sanchez told him it was not something to fight about, but was "common sense."

Sanchez' wife Evelyn testified that in October 1995, she was in her living room with the windows open and heard a loud conversation between Varga and her next-door neighbor Luis Garcia about continuing to deliver the newspaper. At the time, Garcia had a sign on his lawn saying he did not want The News or The Free Press. Garcia called Sanchez by name

and her husband went out onto the porch. He told Varga that he knew that Garcia did not want the newspaper and asked why he continued to deliver it. Varga said that because Garcia was a prepaid customer, it was his job to deliver the paper to him and he would continue to do so. She heard Varga say that he could have Sanchez fired at any time that he wanted. After the conversation, which lasted about 3 minutes, Sanchez came into the house and did not go back outside. She said that Sanchez did not threaten Varga or tell him to watch his back and did not mention anything about a gun during the conversation. He had nothing in his hands when he went outside and they do not own a gun or have one in the house. She also described an incident that occurred while Sanchez was driving her to work. They had stopped at a stop sign and saw Varga, who spoke to Sanchez and gestured towards him with his fist. Sanchez told Varga he should not deliver newspapers to houses with signs in their yards. Varga said that he would continue to deliver to houses for which he did not have "stops." Sanchez told Varga he could report him for littering and Varga said "go ahead." Sanchez did not threaten Varga during the conversation.

Luis Garcia testified that he lives next door to the Sanchezes about 10 to 15 feet away. After the strike started, he had called The News and asked that the newspaper no longer be delivered but he kept getting it. He said that he had told Varga not to deliver the newspaper to him until the strike was over. One day they had a conversation in which Varga got mad at him, told him he owed $11, and asked him to pay. He responded that he paid The News for the paper. He saw Sanchez on his porch and called him over to explain to Varga that he did not want the paper anymore. Sanchez told Varga that Garcia did not want the newspaper and that he should stop delivering it to him. Varga got mad and told Sanchez it was none of his business. Sanchez did not say anything about

a gun, did not threaten Varga, and did not have a gun in his hands. He did not hear Varga tell Sanchez he could get Sanchez fired. He said that he normally speaks Spanish but these conversations were all in English. He said he did not see Varga go onto Sanchez' porch before he went into his house.

Analysis and Conclusions

Although two of the alleged incidents for which Sanchez was discharged did not occur at or near a picket line, the Board's *Rubin Bros.* analysis applies in this case. Sanchez went out on strike and had not returned to work when the alleged incidents took place. With respect to those two instances, the credible evidence shows that when he spoke to Varga he was attempting to convince him to honor the wishes of strike supporters that newspapers not be delivered to them. I find that in doing so Sanchez was engaged in protected activity. I also find that the Respondent has established that it had a good faith belief that Sanchez engaged in serious misconduct under *Clear Pine Mouldings*. After reviewing Varga's incident report and the affidavits of Varga and his wife, Kelleher concluded that Sanchez had threatened to shoot Varga, blow up his house and car, and had displayed a gun when he did so, and that on other occasions Sanchez had made threats to Varga.[81]

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[81] I find that Kelleher's crediting the Vargas was probably not unreasonable under the circumstances. While a close reading of the affidavits shows they are so identical as to raise suspicions that they were the products of collusion, without more, that does not completely discredit what they had alleged. However, it is obvious that the affidavits were composed by a third party and that they are not personal accounts of what each of the Vargas witnessed. The preparation of the affidavits was so sloppy that, in one instance, the author's failure to change the pronouns results in their contradicting

All of the allegations against Sanchez involve Varga and are based only on his unsupported claims. With one exception, involving his wife, none of Varga's testimony was corroborated and all of it was contradicted by credible evidence. Having observed Varga's demeanor while testifying and considered the content of his testimony, I did not believe him.[82] In fact, I am convinced that he is willing to say anything, no matter how outlandish or untrue, if he feels it furthers his purposes.[83] I am also convinced that he did so

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one another. A statement in Varga's affidavit asserts that, on October 25, 1995, Sanchez made a threat to him that he "had better watch [his] back at all times." Mrs. Varga's affidavit asserts that the threat made to her husband was that Mrs. Varga should Watch her back at all times. In both, the affiants swear that Sanchez is "a man I have known for years from working with him." At the hearing, Mrs. Varga testified that she did not know Sanchez prior to the start of the strike.

[82] There is evidence that the Vargas' sole source of income is from delivering newspapers and that any reduction in the number they deliver reduces that income. I find it likely that Varga considered Sanchez responsible for influencing some of his customers, such as Garcia, to stop taking the paper and sought to retaliate against him for doing so.

[83] I found his story about allegedly being attacked and stabbed on the street in January 1998 by four assailants who told him "this is from Juan Sanchez" to be preposterous and scurrilous and granted a motion to strike his testimony on that basis. As in the cases of the alleged death-threats he claims Sanchez was constantly making, there is no credible evidence that this incident occurred, that Varga ever reported it to the police, or that Sanchez was ever investigated or charged as a result. Apparently, even the Respondent did not credit Varga's story enough to take any further action against Sanchez on that basis.

throughout the investigation of his claims and his testimony at the hearing.

Varga's first claim is that Sanchez threatened him at an office on Porter Street on the day the strike began. There is no evidence that, at that point, Varga had done anything to indicate he was not supporting the strike or that Sanchez would know that he was not. Moreover, there is no reason to believe that under those circumstances Sanchez would pull up to a group of carriers, single out Varga, and threaten to shoot him.[84] None of the other carriers appeared as a witness to the alleged death-threat and Varga's wife, whom he testified was present, did not testify about this incident. From all that appears, Varga failed to make any report of this incident until over 3 months later, in October, when he reported an allegedly similar threat by Sanchez outside his home. I credit the testimony of Sanchez that he did not speak to or make any threat to Varga at the Porter Street office.

According to Varga, a second death-threat was made when he and Sanchez encountered each other at Junction and Porter. Sanchez asked him why he was delivering newspapers and then threatened to shoot him. He also made no report of this until October. Sanchez and his wife testified about this incident with far greater detail and specificity than Varga. Both testified that they encountered Varga crossing the street while they were stopped at a stop sign and that Sanchez asked Varga to stop delivering newspapers to houses with signs saying they did not want them. Both denied that Sanchez

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[84] Apparently recognizing this, whoever prepared the affidavit Varga signed on November 10, 1995 (Varga testified that he is illiterate), phrased the threat as being: "he better not catch me delivering papers or he would shoot me."

threatened to shoot Varga. While I recognize that both Sanchez and his wife have a pecuniary interest in this matter, I find no reason to doubt their consistent and plausible testimony about the incident. The only evidence to the contrary is the testimony of Varga which I find unworthy of belief for all of the reasons discussed herein. I find that Sanchez did not threaten Varga and that the incident did not involve any misconduct on his part.

Varga claims that another death-threat occurred on October 25, when he was delivering newspapers near the Sanchez house. According to Varga, for no reason, Sanchez came out of his house, cursed at him, and threatened to shoot him while holding a gun in his hand. Again, I found Varga's testimony about the incident to be incredible. The consistent, detailed, and credible testimony of Sanchez, his wife, and Garcia, who has no pecuniary interest in this matter, establishes that a dispute had arisen over Varga's refusal to honor Garcia's request that he stop delivering the newspaper. After hearing the argument, Sanchez went outside and was called over by Garcia to help him explain to Varga that he didn't want the newspaper. Sanchez and his wife credibly denied that Sanchez threatened Varga. Sanchez was never specifically asked about the allegation that he threatened Varga with a gun and, therefore, did not deny doing so. However, throughout his testimony he consistently and emphatically denied ever threatening Varga. Sanchez' wife, who was asked about the alleged gun threat, credibly denied that Sanchez possessed a gun or displayed one that day. Garcia testified that he did not hear Sanchez threaten Varga or see a gun during the incident. Even in the absence of a specific denial by Sanchez, I find there is no credible evidence that he displayed a gun to Varga and I credit his testimony that he never threatened Varga.

I do not credit the hearing testimony of either of the Vargas about this incident which was totally lacking in detail and context. As noted above, the almost identical affidavits Varga and his wife gave in November 1995 about this incident, while in each other's presence, appeared to me to be the products of collusion. Nothing in their demeanor or testimony at the hearing overcame that impression. In those affidavits, both stated that Sanchez threatened to blow up Varga's car and home. However, neither mentioned those specific threats in their hearing testimony. Varga testified that immediately before Sanchez came out of his house and threatened him, he was having a conversation with a customer who lived 2 doors away. He claimed that the customer did not have a "no papers" sign in his yard, and that Sanchez was not involved in their conversation. He could not identify the customer by name. It is clear from the credible testimony of Garcia, who lives next door to Sanchez and had such a sign in his yard, that it was a loud conversation between he and Varga that brought Sanchez out onto his porch and into their conversation. Mrs. Varga, who claimed she could hear all that was said by Sanchez to her husband, did not mention hearing any conversation between Varga and the customer. According to her, Varga delivered a paper two doors away, she heard hollering, and saw that it was Sanchez, who had a shotgun and was threatening to shoot her husband.

Based on the credited testimony of the Sanchezes and Garcia, which is not contradicted by any credible evidence, I find that the General Counsel has established that Sanchez did not engage in any of the alleged misconduct for which he was discharged and that his discharge violated Section 8(a)(3) and (1).

31. Discharge of Joseph Silva

Joseph Silva has been employed by the DNA since the JOA as a mailer at the North Plant. He previously worked for The News, beginning in 1978. He is a member of Teamsters Local 2040. He went on strike on July 13, 1995, and has not returned to work. During the strike, he did leafleting and picketing. By letter, dated September 27, 1995, he was informed that he was being discharged for threatening and harassing DNA carriers and attempting to run them off the road as they delivered their newspaper routes on August 14, 1995.

Kelleher testified that he made the decision to discharge Silva after reviewing certain photographs and documents. These consisted of (1) a copy of the photo identification card of Joseph Silva; (2) an affidavit of Jeffrey McGregor, dated September 16, 1995, stating that on August 14, 1995, as he and his wife were delivering newspapers at the Carini Villa Apartments, a man he identified from a photo identification card as Joseph Silva began shouting profanities at them, wrote down their license number and said he would get them, twice told them not to deliver to anyone there and said "I'll kick your ass," followed their vehicle, pulled along side it on a two-lane road, and weaved towards them as if to run them off the road; (3) a Strike Incident Report, dated August 14, 1995, by Jeffrey McGregor describing the incident on that date; and (4) three photographs of Silva and his car taken by the McGregors. Based on the information in these materials, he concluded that Silva had threatened the McGregors by writing down the license number of their vehicle and saying, "now, we will get you," that Silva had followed their vehicle and attempted to run them off the road, and that such actions were unprotected and warranted discharge.

Teresa McGregor testified that she worked as a newspaper carrier for the DNA during the strike in July and August 1995. On August 12, as she was delivering newspapers at the Carini Villa, a man came outside and started yelling obscenities at her. She got into their van and her husband got out to finish the deliveries. The man went around to the back of the van told them he had written down the tag number and said, "We'll get you now." The man told her husband that if he delivered to his home, "he would kick his ass." When her husband said he was not on their list, the man said, "Well, if you deliver anywhere in these apartments, I'll kick your ass." After the deliveries were finished and they were driving away, the man got in his car, came at them, weaving back and forth, and tried to run them off the road. She took the photographs of the man, which have been identified as showing Silva.

Jeffrey McGregor testified by means of a videotaped deposition, taken in Wichita, Kansas, in the presence of counsel for the Respondent and the General Counsel, after the Respondent established that it was unable to get him to come to Detroit for the hearing. He testified that he went to the Detroit area and worked as a newspaper carrier from July until December 1995. On about August 12 or 13, he and his wife were delivering newspapers in an apartment complex off Martin Street using a minivan. He was driving and she was walking. Silva came out and walked towards McGregor's wife and began cursing at her. She got into the van and McGregor got out and finished the deliveries. Silva wrote down the tag number of their van and said, "well, we got you now, we'll get you." Silva also said, "If you come back in here, we'll kick your butt." As they drove out of the complex, Silva got into his car with his son and followed them onto Martin. As the street narrowed from two lanes to one, Silva pulled up beside them, driving fast and erratically.

Silva again said that if McGregor came back or tried to deliver newspapers there, he would kick his ass. Silva swerved his vehicle towards them, causing McGregor to slow down to avoid going off the road. He testified that he was concerned by the irrational way Silva was acting in the presence of his son and that he was on the telephone to the Roseville Police while this was taking place.

Joseph Silva testified that on the date of the incident his 8-year-old son called out to him that "the scabs are here." He went out on his balcony and yelled "scab" at them. He then got into his car with his son and drove down to where the carriers were delivering so he could tell them they were "scab pieces of garbage." He got out of his car and began "ripping" them calling them "pieces of shit" and "scabs." At that point, the man was out delivering, so Silva went to the front of his car to see if the woman was inside the van. He never got within 25 feet of their van. The only thing he said to the man was to call him a "scab." As they drove out of the complex onto Martin, he followed them in his car in order to continue to protest their delivery of newspapers in his condominium complex. When they pulled over, he drove up next to them on the driver's side, stopped, and gave the woman the finger. She said that she didn't get a picture of it and asked him to do it again. He obliged because, at that point, his son was looking out the window. He called them a few more names and left. They began to follow him on Martin but turned off to make deliveries. He turned into the same subdivision, spotted their van, drove up to it, wrote down their license plate number, and proceeded home. He did not speak to them at that point. He testified that he took down their tag number "to protect my family" because he had been harassed by someone who threw newspapers near his car. He felt that if "he came back and broke some windows or whatever, I might have some evidence, like it could be this person," although on

cross-examination, he admitted he had never before seen these 2 carriers. He denied that he had ever threatened the carriers or that he said he would kick their asses. He denied that he was weaving back and forth in order to run them off the road or that he attempted to cut them off, as his son was with him and he "wouldn't put his life in harm's way of trying to run a van off the road."[85]

Analysis and Conclusions

Contrary to the Respondent, I find that the Board's *Rubin Bros.* analysis should be applied to Silva's discharge. Although the actions from which it resulted did not occur at or near a picket line, they were directly related to the strike in which Silva was participating and which had resulted in the McGregors delivering newspapers in Silva's neighborhood. I also find that the Respondent has established that, based on the photographs and statements provided by Jeffrey McGregor, it had a good-faith belief that Silva had threatened McGregor with bodily harm if he returned to Silva's condominium complex to deliver newspapers and that he had pursued the carriers in his vehicle and attempted to run them off the road. Such actions constituted serious misconduct under *Clear Pine Mouldings* and were cause for discharge. See *Aztec Bus Lines*, supra at 1029.

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[85] Prior to cross-examination of Silva, counsel for the Respondent requested production of all statements he had given to the Board. At the General Counsel's request, I reviewed *in camera* an affidavit given by Silva, which I determined did not relate to his direct testimony or his discharge for this incident, and ruled that it did not have to be produced. At that time, I failed to specify the provision of the Board's Rule and Regulations pursuant to which I did so. It was § 102.118(b)(2).

This a matter of credibility. Considering their demeanor and the content of their testimony, I found both Teresa and Jeffrey McGregor to be credible witnesses and I believed their account of what transpired between them and Silva. Although neither was positive about the exact date of the incident, I do not consider that significant, given Silva's admissions that the incident took place and that the photographs in the record accurately depict him and his son as they appeared on that date. I found Silva's uncorroborated, self-serving testimony about the incident, portraying himself as the victim, bordered on the ridiculous, as did his suggestion that the presence of his young son in the car, while he pursued the carriers down the highway, tempered his actions.

Pursuant to *Clear Pine Mouldings*, the Board looks at the circumstances surrounding the striker's actions in determining whether they exceed the bounds of peaceful and reasoned conduct. There have been cases in which it has found that a threat to "get" someone or "to kick ass," did not constitute serious misconduct. See, e.g., *Gibson Greetings*, 310 NLRB 1286, 1313 (1993) and *Gem Urethane Corp.*, supra at 1354 fn. 21. However, the "circumstances existing" in those cases are clearly distinguishable from this one. Here, there is no indication that Silva was intoxicated or not serious about his threats. If anything, the unprovoked, prolonged, and irrational nature of his actions increased their coercive effect.

Silva, who was inside his home, came out upon learning that the carriers were outside in the condominium complex making deliveries. He did so for the specific purpose of harassing them. He began following them through the complex, shouting profanities, and wrote down their license tag number immediately before telling them that "now" he would "get" them, implying, that the tag information would assist him in doing so. He specifically told McGregor not to

return to the complex again to deliver newspapers or he would kick his ass. He did this while they were still in the complex and again after following them out onto the highway and attempting to run them off the road. Considering all of the circumstances, I find that under any objective standard, Silva's actions, viz, threatening Jeffrey McGregor and following the McGregors out of the complex, weaving his vehicle near theirs on a public road, and copying down their license number while threatening to "get" them, "either were actually violent or tended to instill a fear of bodily harm." *Gem Urethane Corp.*, supra at 1353. Those actions were coercive and intimidating and constituted serious misconduct. I find that counsel for the General Counsel have failed to establish that Silva did not engage in the misconduct for which he was discharged and have not proved a violation of the Act. I shall recommend that this allegation be dismissed.

32. Discharge of Larry Skewarczynski

Larry Skewarczynski has been employed by the DNA as a district area manager since the JOA. He had previously worked for The News. He is a member of Teamsters Local 372. He went on strike on July 13, 1995, and has not returned to work. By letter, dated August 1, 1995, he was informed that he was being discharged for injuring a security officer by squirting a liquid into his face on July 29, 1995. The letter also states that his "overall disciplinary record was viewed as an aggravating circumstance in [his] discharge."

Kelleher testified that he made the decision to discharge Skewarczynski after reviewing a videotape of the incident and certain documents. The documents were (1) a copy of Skewarczynski's photo identification card; (2) an unsigned note, dated July 29, 1995, stating that Skewarczynski sprayed a liquid into the eyes of "Compl (sic) Spurlock," causing a

burning/stinging sensation and that an assault complaint was made to the police; (3) a DNA Incident Report by Bernard Holden stating that, on July 29, 1995, he observed and videotaped the spraying of a liquid into the eyes of a security guard; (4) a DNA Incident Report by Jeffrey Spurlock, dated July 29, 1995, stating that, on that date, while he was fiming a guard making a nail sweep at the Lincoln Park Distribution Center, a strike supporter sprayed a liquid into his eyes, causing a burning/stinging sensation accompanied by blurred vision for approximately 10 minutes; and (5) a Wyandotte Hospital Emergency Dept., Patient Instruction Sheet, dated 7/29, stating that a physician had prescribed eye drops for Jeffrey Spurlock on that date. Based on these materials, he concluded that Skewarczynski had squirted a liquid in the direction of a cameraman, striking him in the eyes, resulting in a burning/stinging of his eyes, which caused him to be taken to a hospital where he was treated and released. He concluded that Skewarczynski's picket line actions were not protected activity and that he should be terminated.

Bernard Holden testified that in July 1995 he was employed by APT as a security guard. On the morning of July 29, 1995, he was at the Lincoln Park Distribution Center videotaping 2 other guards making a sweep for nails and other objects near the picket line. He observed Skewarczynski, whom he identified at the hearing from a photo, use a little water pistol to spray liquid into the eyes of security guard Jeffrey Spurlock. After the sweep was completed, he heard Spurlock say, "I have something in my eyes, it's burning, stinging and it tastes salty." Spurlock went to the restroom to wash out his eyes, was taken to a hospital, and later returned to the picket line. He did not see Skewarczynski squirt anyone other than Spurlock that day.

Skewarczynski testified that he was at the Lincoln Park Distribution Center picket line on July 29, 1995. He said that he had a small squirt gun with him which he filled with drinking water from the containers used by the picketers, which was provided by the Lincoln Park Fire Department. He used the gun to give himself a drink and to squirt at other strikers. He also used it numerous times to squirt at the videocamera being used by one of the security guards near him whom he felt had singled him out and was following him. He said that he had done the same thing on the previous day. He stayed at the picket line with the squirt gun for the rest of the day. After he left and was driving home that evening, he was pulled over by the police who searched his car. When he realized that they were looking for his squirt gun, he took it out of his pocket and handed it to them. He was not arrested and never heard anything more from the police as a result of this incident. He contacted the police a couple of weeks later to see if he could get his squirt gun back, but it could not be found.

Analysis and Conclusions

While it is an extremely close case, I find that the Respondent has established that it had a good-faith belief that Skewarczynski had engaged in serious misconduct. I doubt that the act of playfully squirting someone with a water gun on a hot summer day, even where it involves a striker squirting a security guard near a picket line, would ordinarily be considered to be so heinous an act as to warrant the firing

of an employee with over 16 years of service.[86] However, here, the Respondent did have a report from the security guard involved that said he was struck by a liquid that caused a burning, stinging sensation in his eyes and blurred his vision for 10 minutes. I find this was sufficient to support a belief that Skewarczynski's squirt gun contained a substance that had injured the security guard.

I also find that counsel for the General Counsel have established by a preponderance of the evidence that Skewarczynski did not engage in serious misconduct. Having observed his demeanor and considered his testimony as a whole, I found Skewarczynski to be a refreshingly candid witness and credit his testimony. He freely admitted squirting numerous people at the picket line over a 2-day period, including, one or more of the security guards. The question is what he squirted them with, water as Skewarczynski testified or "a corrosive substance" as the Respondent alleges in its brief. I find no reason to doubt Skewarczynski's credible testimony that it was water, the same water that he squirted on other people and which he and other picketers drank. There is no evidence to the contrary and none to establish that it was a corrosive substance. While I do not doubt Holden's testimony that he saw Skewarczynski squirt something at Spurlock and that he heard Spurlock complain that he was suffering from burning eyes and blurred vision, I do not find that it establishes that Spurlock was in fact injured. Although Spurlock was taken to the hospital as a result of his complaints, there is no evidence establishing or

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[86] It appears that the Respondent recognized this and attempted to buttress its position by referring to other disciplinary actions it had taken against Skewarczynski before the strike, at least some of which were still being contested in the grievance process.

even suggesting what the substance was that caused his alleged symptoms. Nor was there any evidence of the diagnosis, if any, that resulted from his hospital visit. He obviously suffered no injury as he was back on duty at the picket line a short time later. I find it significant that Spurlock was not called as a witness at the hearing and I had no chance to hear or evaluate his testimony about this incident. No explanation was given for his failure to appear. It is one thing to claim an injury and give an unsworn statement about it to one's employer and another to testify under oath and be subject to cross-examination at a Board hearing. Skewarczynski said that he had squirted the security guard, who was following him with a camera, between 10 and 20 times that day. It is not unreasonable to believe that Spurlock had had enough and decided to retaliate against Skewarczynski by accusing him of causing an injury. There was no dispute but that Skewarczynski had squirted something at him and his generalized complaints of discomfort would be difficult to disprove.

Considering all of the evidence, I find that Skewarczynski did squirt Spurlock with a small amount of water that day. I find no evidence that the water was adulterated in any way or that it caused any injury. Under the circumstances, by no stretch of the imagination, could this prank be considered coercive or intimidating or to constitute serious misconduct. The Respondent's reliance on *Aztec Bus Lines*, supra, is misplaced. There, the Board found that throwing hot liquids or other objects into the faces of the drivers of moving vehicles constituted serious misconduct. The difference between that conduct and Skewarczynski's is obvious. Based

on the foregoing, I find that Skewarczynski's discharge was a violation of Section 8(a)(3) and (1).[87]

33. Discharge of Ben Solomon

Ben Solomon has been employed by the DNA since the JOA as a mailer. He had previously worked for The News beginning in 1978. He is a member of Teamsters Local 2040. He went on strike on July 13, 1995, and has not returned to work. He testified that, during the strike, he did picket duty and worked in the office of The Sunday Journal. By letter, dated September 18, 1996, he was informed that he was being discharged because, on February 1, 1996, he harassed a DNA employee in the vicinity of 615 W. Lafayette Boulevard and threw star nails in the path of the employee's car.

Kelleher testified that he made the decision to discharge Solomon after reviewing a number of documents. The documents were (1) a report of an interview of Kevin Washington on May 5, 1996, concerning the incident on February 1, 1996; (2) a DNA Observation Report by James Price concerning an incident on February 1, 1996, in which Price states that Solomon called him names in front of a credit union, that when he left the credit union he found star nails

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[87] The Respondent's claim, that Skewarczynski was properly discharged and/or can be denied reinstatement based on his overall disciplinary record, is not persuasive. That record had not resulted in his discharge prior to the squirting incident. The issue here is whether or not his conduct on July 29, 1995, was coercive and intimidating under the *Clear Pine Mouldings* standard. Nothing he had allegedly done previously, such as, being late for work or performing his work poorly, could be said to have had any impact on the security guards or employees present at the Lincoln Park Distribution Center on that date.

around his car, and that when he drove away Solomon was ahead of him in a car and was throwing star nails out of the window; (3) a report of an April 10, 1996 interview with James Price about the incident on February 1, 1996; (4) an unsworn affidavit of James Price, dated July 7, 1996; and (5) another report of an interview of Kevin Washington on May 5, 1996, concerning the incident on February 1, 1996. Based on the information in these documents, Kelleher concluded that Solomon had confronted Price outside the credit union, berating and cursing him. When Price drove away, Solomon, who was a passenger in a car that got in front of Price's vehicle, threw star nails into its path. He determined that he should be terminated for throwing the star nails.

James Price testified that he is employed by The Free Press as a maintenance worker at the Riverfront Plant. He went out on strike on July 13, 1995, but returned to work after 2 weeks. He testified that he went to the Communicating Arts Credit Union with Kevin Washington on February 1, 1996. As they entered, Solomon called him "a scab motherfucker." Solomon followed him inside and shouted, "if they had drug testing at The Free Press, you wouldn't have a job." Price finished his business and went outside to wait for Washington. He noticed about six star nails under his car and picked them up. As they drove off, Solomon was a passenger in a white Taurus that pulled out right in front of them and he saw Solomon throwing star nails out of the car 2 different times. He was able to dodge the star nails and his car was not damaged. He said that he had not spoken a word to Solomon during the incident.

Solomon testified that, on February 1, 1996, he and another striker, Doug Young, had gone to the credit union. After they transacted their business and had exited, they were standing on the steps talking with a third person. Price, whom

he knew from work, got out of his car and approached them along with another person. Solomon called Price "a fucking scab." Price said he was not "a fucking scab" and Solomon asked him what he thought someone who crossed a picket line was. Price did not respond and entered the credit union. After standing there talking for a while, Solomon left. He said that he did not reenter the credit union and was not in it while Price was. As they drove away from the credit union, Price and the other person were following them for about three or four blocks. They tried to get away from them but they were right on their tail. He rolled down the window, put his arm out, and gave them the finger. He said that he did not have any star nails in his possession and did not throw any at or place any near Price's vehicle.

Analysis and Conclusions

I find that the Respondent has established that it had a good-faith belief that Solomon threw star nails into the path of Price's vehicle as they left the credit union on February 1, 1996, based on the statements given by Price at the time of the incident. Those statements were supported, in large part, by the statements given by Washington, although he did not actually see star nails being thrown from the car. Such an attempt to damage a nonstriker's vehicle constituted serious misconduct under *Clear Pine Mouldings*. See *Columbia Portland Cement Co.*, supra.

This is a matter of credibility. I find no reason to believe that Price would fabricate this story and credit his testimony over the self-serving denial by Solomon. Price was subjected to extensive cross-examination about the incident which did nothing to undermine his credibility. There were minor discrepancies in the details of the incident between his testimony at the hearing and the statements he gave to the

Respondent's investigators, such as, seeing Solomon throw star nails from the car two times rather than one. However, this may well have resulted from the questions he was asked or what he thought was important to report. There was nothing which cast significant doubt on his veracity.[88] I find that counsel for the General Counsel have not established by a preponderance of the evidence that Solomon did not engage in the misconduct for which he was discharged and have not proved a violation of the Act. I shall recommend that this allegation be dismissed.

34. Discharge of Richard Stringer

Richard Stringer has been employed by the DNA since the JOA as a mailer at the North Plant. He had previously worked for The News beginning in October 1982. He is a member of Teamsters Local 2040. He went on strike on July 13, 1995, and has not returned to work. He testified that he regularly did picket duty during the strike. By letter, dated August 2, 1996, he was informed that he was being discharged for blocking ingress and egress to the DNA's executive garage by pushing a vehicle into the entrance of the garage door and deflating its tires.[89]

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[88] I find the fact that Washington was not called as a witness is not significant. He indicated in his statement that while he saw Solomon make a throwing motion from the car he did not see any star nails being thrown. His testimony would have added little. On the other hand, there was no explanation as to why Young was not called to verify Solomon's version of the incident.

[89] A second discharge of Stringer, arising from the incident at the Hayes Distribution Center on August 29, 1996, is discussed below.

Kelleher testified that he made the decision to discharge Stringer for the garage incident after reviewing a videotape of the incident and certain documents. The documents were (1) a copy of Stringer's photo identification card; (2) a Detroit Police Department preliminary complaint, dated May 23, 1996, concerning his arrest of Stringer after being observed pushing a vehicle into a partially open garage door of The News building and then deflating the front tire on the driver's side; and (3) a DNA Investigations report, describing the incident, stating that the city attorney had denied a warrant, and stating that the damage to the garage door was approximately $ 260. Kelleher had also been in the building at the time of the incident, had gone down to the garage, and had observed the position of the vehicle and the damage it did to the door. He concluded that Stringer had attempted to push the car into one of the doors and deflate a tire, that this would have prevented vehicles from entering and exiting the garage, that this was not protected activity and that Stringer should be discharged.

Richard Stringer testified that, on May 23, 1996, he participated in an "action" taking place at The News building. A group of people marched to the building from a union hall and he was a marshal, responsible for seeing that his group got there safely without hurting any property or themselves. When they approached the building, there were two vehicles parked in the garage entrances with the doors down on top of them. His group, which was in the front, stopped near the garage and tried to get the people who were on the stalled cars to get off of them. As he was doing so, he was arrested. He said that he had not attempted to push the car into the door, as it was already in the doorway with the door down on its bumper when he got there. He said that he attempted to push the car back to free it from the door but it would not move. He also denied that he had ever touched the tires or let

the air out of them. He testified that he was not criminally prosecuted in connection with this incident.

Analysis and Conclusions

I find that Stringer was on strike at the time of the incident for which he was discharged and that it arose out of or was closely related to a demonstration in which he was participating in support of the strike. I also find that the Respondent has established that it had a good-faith belief that Stringer was a participant in the vandalism and blocking of the executive garage doors at The News building which interfered with employees' rights to freely enter and leave their workplace, that such conduct was coercive and that it constituted serious misconduct.

The videotape and the testimony of Stringer and former Detroit Police Inspector Garrett Ochalek establish that, on May 23, 1996, there was an organized pro-strike march and demonstration outside The News building. It is also clear that at about the same time a preplanned effort to block the garage entrances with disabled vehicles was underway. Whether the two events were coordinated is problematical. As the marching demonstrators arrived at the building, 2 vehicles were driven into the executive garage doorways and attempts were made to disable them. This effectively prevented any vehicles from entering or exiting the garage until they were removed. The effort to block the garage entrances in this manner was clearly unlawful and unprotected and the participants were engaged in serious misconduct. The only question here is whether or not Stringer was one of those participants or, as he claims, an innocent victim who was actually trying to stop the misconduct, not assist it. I find that his innocence has not been established by a preponderance of the evidence.

The only evidence in support of Stringer's position is his self-serving testimony as to what he was doing. The videotape of the pertinent part of the incident is focussed primarily on what was going on with the car at the first garage doorway, not the one that Stringer was near when he was arrested. That car had gotten well into the doorway before the garage door was partially closed onto its hood. There were demonstrators standing on that car holding signs and it is clear that an effort was being made to disable that car and deflate its tires in order to make its removal more difficult. While this is going on, Stringer is shown walking by and making no effort to persuade those demonstrators to stop. By the time the camera panned to the car at the second doorway, which has only a part of its front bumper under the partially closed door, Stringer's self-proclaimed efforts to get people off that vehicle were apparently over. He is shown near the driver's door, facing towards the garage, and appears to be assisting in an unsuccessful effort to move the car farther forward into the doorway. After only a few moments, he and others are apprehended and taken away by the police. While there is no evidence that Stringer was involved in the initial positioning of the cars in the garage entrances, which happened before he reached the scene, he clearly joined the effort to make it more difficult for one of them to be removed.

Although Stringer claims he was trying to free the vehicle from the door, I did not believe him. It is obvious that those persons seen rocking the car in the second doorway were trying to move it forward, as evidenced by the fact that one person is standing directly behind it and is pushing on the trunk lid at the same time another is attempting to deflate the rear tire on the driver's side. I find it unlikely that Stringer, who was facing towards the garage door, was attempting to *pull* the car back by himself while the others were pushing it forward. Counsel for the General Counsel argues that it

would be "ludicrous" for Stringer to try to move the car forward with the door already down on it and knowing that the police were all around. That may be, but the videotape shows several others engaged in the same ludicrous effort, all of whom were arrested. It appears that they were trying to further damage and/or jam the door by continuing to ram it with the car. While I agree that there is no evidence in the videotape that Stringer attempted to deflate the tires of the vehicle, there is clear evidence that he was an active participant in the effort to block the garage doorway. That constituted serious misconduct under *Clear Pine Mouldings* and warranted discharge. See *GSM, Inc.*, 284 NLRB 174, 175 (1987) (Smith discharge).

I find that counsel for the General Counsel have not carried the burden of establishing that Stringer did not engage in the misconduct for which he was discharged and have not proved a violation of the Act. I shall recommend that this allegation be dismissed.

35. Discharges of Gary Tebo

Gary Tebo has been employed by the DNA since the JOA as a pressman. He had previously worked for The News, beginning in 1969. He is a member of GCIU Local 13N. He went on strike on July 13, 1995, and has not returned to work. By letter, dated September 12, 1995, he was informed that he was being discharged for his conduct on August 2, 1995, which involved threatening and harassing a newspaper carrier and throwing a rock at and damaging the carrier's car. By letter, dated August 2, 1996, he was informed that he was also being discharged for maliciously damaging the property of a DNA advertiser in Sterling Heights on April 18, 1996.

a. The August 2, 1995 Incident

Kelleher testified that he made the decision to discharge Tebo after reviewing certain documents. The documents were (1) a copy of the photo identification card of Tebo; (2) a Strike Incident Report, August 2, 1995, by Kay Murphy, describing an incident in which a man drove up to her car, threw a newspaper at it, pounded on and kicked her car, demanded that she get out, and threw a large rock that struck the driver's side door, denting it and scratching the paint; (3) an unsworn affidavit of Kay Murphy, dated August 25, 1995, describing the incident on August 2 and identifying the person involved as Gary Tebo; and (4) an Eastpointe Police Incident Information Form, dated August 2, 1995, by Officer Chad Margita, stating that Kay Murphy and Delbert Boule reported being pursued by Tebo as if to ram their car, that he yelled at them, beat on the car window, and threw a stone at the car which put a small dent in it, that Tebo came to the scene and said he tried to return a newspaper to them but after they yelled and swore at him he threw the newspaper but nothing else at them and left. Based on the information in these documents, he concluded that Tebo had chased the carriers while they were delivering newspapers, kicked their car, and threw a rock which dented the car; that his conduct was not proper; and that discharge was warranted.

Kay Murphy testified that she began delivering newspapers for the DNA in July 1995. On August 2, while delivering her route with another carrier, she saw a small white car approaching at a high rate of speed. She pulled her vehicle over and the white car stopped. The driver, whom she identified at the hearing as Tebo, after being shown the copy of his photo identification card, got out and threw a newspaper which glanced off her windshield. He started kicking and beating on her car and demanding that she get

out. When she took out a telephone and called the police, Tebo drove away. While she sat there waiting for the police to come, Tebo returned from the opposite direction, stopped, and yelled at her. She saw him throw an object at her car which struck the rear driver's side door. When the police arrived, she got out and saw that there was a dent and scratch where the object had struck the vehicle, which was a brand new rental car. She also saw two or three rocks lying by the car. After the police arrived, Tebo returned to the scene and told the police that the carriers had done something at his house. The police looked at his driver's license and let him go, then took the carriers' statements.

Chad Margita is a police officer with the Eastpointe Police Department. He testified that he responded to the scene of the incident involving Tebo and the carriers on August 2, 1995. The carriers told him their version of what had happened and he observed a fresh dent in the rear driver's side door which appeared to have been caused by a small to medium size stone. Tebo, who appeared irritated and enraged, drove up while he was there and said that he had driven there earlier to return an unwanted newspaper that the carriers left. He denied all of their other allegations. The carriers admitted delivering a newspaper to Tebo's house but denied knowing that it belonged to a striker.

Tebo testified that he was mowing his grass on August 2, 1995, when a car went by slowly and a newspaper was thrown onto his lawn. This was the fourth or fifth day in a row that it had happened. He did not take the newspaper or want it delivered. He got in his car, drove down to where the carriers were, got out, and flipped the newspaper towards them, telling them that he was a striker and did not want the newspaper. The male carrier responded that they would do whatever they wanted and Tebo again said he did not want the

paper left on his lawn. He went home and called the police to file a complaint against the carriers for littering. After talking with the police on the telephone, he went back to where the carriers were parked and talked to the police officer there about filing a complaint. He said that he did not make any physical contact with the carriers' vehicle, beat against the windows, or throw anything at it, other than the newspaper. He said that he later dropped the charges he filed against the carriers because a police officer told him they could not be found and there was not much that could be done anyway.

Analysis and Conclusions

I find that at the time of this incident Tebo was on strike, that the Respondent treated him as a striker, and that the incident arose out of and was closely related to the strike. Accordingly, I find that the Board's *Rubin Bros.* analysis applies. I also find that the Respondent has established that it had a good faith belief the Tebo had engaged in misconduct when it discharged him for this incident. The reports and statements that Kelleher reviewed indicated that he had pursued the carriers, beat on and kicked their vehicle, and threw a stone at it which caused a dent and scratched the paint. Such actions constitute serious misconduct under *Clear Pine Mouldings* and are grounds for discharge. E.g., *Columbia Portland Cement Co.*, supra; *Aztec Bus Lines*, supra.

I also find that the General Counsel has not established by a preponderance of the evidence that Tebo did not engage in that misconduct. While I believed his testimony that the carriers threw a newspaper on his lawn and that he was irritated by it, there is no evidence that it was done maliciously or in an attempt to provoke him. I did not believe his self-serving testimony that he merely threw the newspaper

at the carriers' vehicle and left the scene, nor his claim that he filed a littering complaint against them. The police officer who responded to the scene made no mention of a formal complaint being made and there is nothing in his report to indicate that he was responding to a call by Tebo. I found Murphy to be a credible witness and believed her testimony that she called the police after Tebo pursued them, beat on their vehicle, and damaged it by throwing an object at it. The damage done to the vehicle was corroborated by the testimony of Officer Margita, a disinterested third party. Even accepting the fact that, as a striker, Tebo was understandably annoyed by the newspaper being thrown on his lawn, his violent and threatening response was completely out of proportion to this minor provocation and constituted serious misconduct. I shall recommend that this allegation be dismissed.

b. The April 18, 1996 Incident

Kelleher also made the decision to discharge Tebo for the April 18, 1996 incident after reviewing the following documents (1) a Sterling Heights Police Department report, dated April 18, 1996, stating that Tebo had been observed kicking the head off a sprinkler while picketing in front of the Sterling Heights Dodge dealership, doing about $150 in damage, and that he was arrested and charged with malicious destruction of property, with attached statements of three witnesses who identified Tebo as the person who kicked and damaged the sprinkler head and stating that he used obscenities and threatened to kick the ass of one of the witnesses; (2) a DNA-APT Incident Report, dated April 18, 1996, by Roy Alexander, stating that the general manager of Sterling Heights Dodge had reported that he had observed a picket who was leafleting in front of the facility kick and break the head off a sprinkler, that he had found another sprinkler head that was also damaged, and giving a

description of the perpetrator; (3) a statement, dated July 17, 1996, by Russ Maisano, saying that he is the general manager of Sterling Heights Dodge, that the business has advertised in The News and The Free Press three times a week since December 1995, that since March 1996, there have been pickets near the dealership continually, that on April 18, 1996, at about 5 p.m. he went out to tell the pickets that the sprinklers would be coming on and they began yelling at him, that after the sprinklers came on he saw an individual kick and damage one of the sprinkler heads, that the police were called and charged him with destroying property, and that he identified Gary Tebo as the perpetrator from a photo identification card he was shown; (4) a written statement, dated April 24, 1996, signed by Gary Tebo, given to the Sterling Heights Police Department stating that he was leafleting at Sterling Heights Dodge on April 18, 1996, when he saw a sprinkler gushing water and that he did nothing to it; and (5) a bill for $ 156 for repairs to the sprinkler system at Sterling Heights Dodge, dated April 26, 1996. Based on the information in these documents, Kelleher concluded that Tebo had damaged the sprinklers on the property of one of the newspapers' advertisers while leafleting there and that he should be terminated.

Tebo testified that he and others had leafleted at Sterling Heights Dodge for several months prior to the April 18 incident and that the people at the dealership hassled them by turning on the sprinklers in cold weather, putting tires where they were standing, and turning on alarm horns. On April 18, the sprinklers came on and reached the sidewalk where they were standing and got them wet. He put his foot on one of the sprinklers to see if he could turn it away from them and it broke off. He was arrested about a week later while leafleting. He pled guilty to a misdemeanor charge of malicious destruction of property on the advice of his lawyer

rather than going to trial on a felony charge. He was fined $ 300 and paid restitution of $111.

Analysis and Conclusions

Based on Kelleher's testimony that he reviewed the police report and attached witness statements concerning the incident, I find that the Respondent has established that it had a good faith belief that Tebo had committed an act of vandalism by kicking and breaking a sprinkler head while leafleting at the Sterling Heights Dodge dealership. I also find that his actions constituted serious misconduct.

The General Counsel presented the testimony of Ann Sweeney Lorenzetti who was part of the group that did leafleting at Sterling Heights Dodge for several months in 1996. She testified that on a number of occasions when the leafleters were present, the sprinklers were turned on notwithstanding the fact that it was freezing cold. She described one incident where the sprinklers came on momentarily as she was reaching down to pick up a cup of coffee and soaked her. She saw some salesmen looking out the window and laughing. Another time she saw a workman washing off cars with a hose who beckoned to one of their group to come over and then squirted her with the hose. She testified that on April 18 the sprinklers came on unexpectedly for a brief period and the leafleters got wet. She saw a group of people gathered at the window laughing. She also said that she did not see Tebo do anything to the sprinkler that day. While I found Lorenzetti to be a credible witness and believe that the leafleters were probably intentionally squirted at times by people at the dealership, I also find this does nothing to help Tebo. It does not establish that he did not kick and break the sprinkler head. Indeed, Tebo now admits that he damaged it, but claims it was inadvertent, as he was merely trying to

redirect the spray. I did not believe him. His self-serving testimony about this incident was no more credible than that concerning the carriers he harassed. He first gave a statement to the police in which he denied doing anything to the sprinkler. He then pled guilty to a criminal charge of malicious destruction of property, paid a fine, and made restitution. That conviction is conclusive on the question of whether he committed the criminal act of malicious destruction of property. Insofar as the General Counsel contends that Tebo's criminal act was provoked and excusable, I do not agree. He could have raised that defense at the criminal trial, but he pled guilty instead. In any event, I am unable to conclude that, even if the there was provocation, it was such as to excuse his criminal conduct. I find that the General Counsel has not established by a preponderance of the evidence that Tebo did not engage in serious misconduct on April 18, 1996, and has not proved a violation of the Act. I shall recommend that these allegations be dismissed.

36. Discharge of Henry Thompson

Henry Thompson has been employed by the DNA since the JOA at the Southfield Distribution Center as a district manager. He apparently previously worked for one of the newspapers going back to March 1978. He is a member of Teamsters Local 372. He went on strike on July 13, 1995, and has not returned to work. He testified that during the strike he did leafleting and picketing. By letter, dated April 22, 1997, he was informed that he was being discharged for conduct that occurred "on or about July 19 (sic), 1995." The letter states that on that date he stuck an ice pick into the tire of a carrier's vehicle, causing it to go flat, as she was leaving the Southfield Distribution Center.

Kelleher made the decision to discharge Thompson for damaging a tire on the vehicle of carrier Charlene Brown as it left the Southfield Distribution Center. Previously, a striker named Anthony Edwards had been identified, in affidavits given by Charlene and Jason Brown, as the person who damaged the tire on the morning of July 16, 1995. As a result, Edwards had been discharged on July 31, 1995. That decision was made by then-Circulation Director Tommie McLeod. Thereafter, a friend and coworker of Edwards, Jesse Kennedy, who had been on strike for about a week or two after it started, crossed over and returned to work. Sometime after returning, Kennedy informed the Respondent that he had witnessed the incident involving Brown's vehicle and that Edwards was not the person who had punctured Brown's tire. He said that he had seen Thompson do it. As a result, Kelleher rescinded the discharge of Edwards on April 23, 1996 and, a year later, fired Thompson. Kelleher based his decision on an affidavit given by Kennedy, dated March 20, 1996, in which he said he saw Thompson stick a tool like an ice pick into Brown's tire while it was moving through the picket line.[90]

Thompson testified that he regularly picketed at the Southfield Distribution Center and was present on the morning of July 16, 1995, along with 100 to 150 other picketers. He said that he had seen Brown enter the facility that morning but did not see her leave. He said that he does not own an ice pick, that he did not use a star nail or any other device to damage a vehicle, that he did not damage the tires of Brown's vehicle, and that he did not see anyone else

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[90] He also overheard some of a conversation between Taylor and Kennedy about this incident but he did not talk directly to Kennedy about it.

do so. He said he knows both Kennedy and Edwards and that he thought he saw Kennedy at the picket line that morning but he could not remember if he saw Edwards.

Analysis and Conclusions

I find that the Respondent has failed to establish that it had a reasonably-based, good-faith belief that Thompson damaged Brown's car when it fired him. It had already concluded that Edwards had done that damage and fired him on the basis of the affidavits of Charlene and Jason Brown. It presumably credited those affidavits since it was willing to terminate an 11-year employee on that basis alone. However, when Kennedy showed up and claimed that it was not his friend Edwards but Thompson who did the damage, it disregarded the Browns' identification of Edwards as the perpetrator and embraced Kennedy's identification of Thompson. There is no evidence that it resolved the obvious conflict in these alleged eyewitness accounts, let alone, that it had a reasonable basis for doing so.[91]

There is no probative evidence in this record that Brown's vehicle was in fact damaged. Brown did not testify and her failure to appear has not been explained.[92] Although Kennedy

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[91] Also, the discharge letter sent to Edwards stated that he was being fired for "placing an object under a . . . carrier's vehicle . . . causing the tire to go flat." Kennedy's story was that the tire was punctured with an ice pick, while it was moving. Presumably, an object placed under the vehicle would have damaged the tire through the tread and the ice pick would have damaged it through the sidewall. There is no evidence that this conflict was resolved.

[92] The unsworn, hearsay statements by Charlene and Jason Brown were admitted solely to establish the basis for the

claimed he saw Thompson stoop down near Brown's car and puncture a tire with an ice pick, he also said that the vehicle drove away without any apparent difficulty. Edwards, who was with Kennedy that night, also testified that Brown's vehicle drove away from the picket line without any problem.

I also find that there is nothing that casts any doubt on Thompson's credible testimony that he did not damage Brown's vehicle. The only evidence to the contrary is the testimony of Kennedy. Having observed his demeanor while testifying and considered the evidence as a whole, I did not believe him. It appears that early in the strike Kennedy and Edwards decided to cross over and return to work. Kennedy went back about two weeks after the strike began but by that time Edwards had already been discharged for allegedly damaging Brown's tire. Kennedy was aware of this a day or two after the discharge. Kennedy said that within 2 weeks of his return, he went to McLeod and told her that it was Thompson, not Edwards, who had damaged Brown's tire. When nothing had happened by March 1996, after talking with Edwards, he went to see Taylor and gave the affidavit purporting to exonerate Edwards and incriminate Thompson. According to Kennedy, as Brown's vehicle exited, Thompson, who was 10 feet from him and 2 feet in front of Edwards, stooped down, stuck an ice pick which he had previously shown to the picketers into the front tire on the passenger side. He then stood up and said "I got it." Edwards, who was standing next to Thompson, turned to Kennedy and said "did you see that?" Kennedy nodded affirmatively.

Respondent's alleged good-faith belief that Edwards had damaged their vehicle. Similarly, Kennedy's hearsay statement that he had "later heard" that Brown's tire had gone flat is insufficient to establish that the tire was damaged.

Edwards' testimony either failed to corroborate or contradicted that of Kennedy in almost every significant respect. The exceptions were that he had discussed returning to work with Kennedy before he was discharged and that, after he was fired, he and Kennedy discussed trying to get his job back. He testified that on the night in question he recalled seeing Brown, a person he had previously supervised, exit through the picket line in a vehicle and that he and Kennedy were no closer than 20 to 30 feet from her vehicle when she did so. He also testified that he did not see anyone puncture or attempt to puncture her tire. Since he was standing closer to Thompson and Brown's vehicle than Kennedy, he was in a better position to see the alleged puncturing than Kennedy. Moreover, since he did not see Thompson puncture the tire, there is no reason to believe that he asked Kennedy, "did you see that?" Edwards also testified that Kennedy later told him that some people came to him and told him who did the damage, indicating that Kennedy did not witness it himself.

The Respondent's contends that Kennedy, on whom its entire case against Thompson depends, had no reason to fabricate a story about him. This ignores the fact that Kennedy was actively involved in trying to assist his friend Edwards in getting his discharge rescinded so that he too could cross over, as they had previously planned. Although Kennedy claimed that he told McLeod that it was Thompson who was the perpetrator not Edwards, the fact is nothing happened. However, after he talked to Taylor several months later, Edwards was reinstated and Thompson was eventually discharged. I find it likely that Kennedy merely told McLeod, who did not testify at the hearing, that Edwards did not do it. When that failed to accomplish his purpose, he identified

Thompson as the perpetrator.[93] On the other hand, Edwards had nothing to gain by failing to corroborate his friend Kennedy's story at the hearing. Consequently, his failure to do so convinces me that Kennedy is not a reliable witness.

I find that the evidence as a whole establishes that Thompson did not engage in the alleged misconduct for which he was discharged and that his discharge violated Section 8(a)(3) and (1).

37. Discharge of Howard Turner

Howard Turner has been employed by the DNA in the mailroom at the North Plant since the JOA. He had previously worked for both The News and The Free Press, beginning in 1969. He is a member of Teamsters Local 2040. He went on strike on July 13, 1995, and has not returned to work. During the strike he did picket duty. By letter, dated January 31, 1997, he was informed that he was being discharged for harassing, assaulting, and intimidating a carrier as she attempted to deliver newspapers on January 9, 1997.

Kelleher testified that he made the decision to discharge Turner after reviewing a number of documents. The documents were (1) a copy of a photo identification card for Howard Turner; (2) a contractor incident report, dated January 9, 1997, in which carrier Donna Jones states that on that date a striker, who had threatened her before, called her

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[93] It appears that Thompson was a randomly chosen victim of Kennedy's fraudulent effort to assist Edwards. He obviously had to choose someone he knew was present that night. If he had not, and it turned out the person he fingered could show he was not there, his fabrication would have been exposed immediately.

a "fucking scab bitch," that he threw a shovel which just missed her car, that he approached her car as she was calling "911," reached in and grabbed her and tried to take her phone, and that after the incident she found her broken chain in the car; (3) an undated statement by Jones about the incident; (4) a DNA Investigations report, dated January 9, 1997, stating that a DNA investigator accompanied Jones to a meeting with the city prosecutor who authorized a complaint charging Turner with misdemeanor assault and battery; and, possibly, (5) a complaint charging Turner with assault and battery. Based on the statement of Jones, Kelleher concluded that Turner had verbally harassed her, threw a snow shovel at her car, came over to her car as she called "911," reached in and while attempting to grab her phone broke a gold chain she was wearing. He felt that Turner had engaged in misconduct and should be terminated.

Donna Jones testified that she was delivering newspapers at about 3:20 p.m. when Turner called her a "fucking scab bitch." She stopped her car and told him she was going to call the police again. She knew who he was because she had reported him to the police a few days after the strike began when he had blocked her car and told her to stop delivering newspapers and that he knew where she lived. Turner threw his shovel at her car but missed. As she was calling 911 and talking to the operator on her phone. Turner came down to her car, reached inside through the side window, which was open in order to distribute the newspapers, and tried to grab the phone out of her hand. She also called her fiance who was shopping nearby and told him what was happening. He came the scene to help her. They got out of their vehicles and told Turner that the police had been called and asked why he was harassing her. The police arrived and they filed a report. She said that, when she got home after the incident, she saw her necklace was on the floor of her truck but she was not sure

how it got there. On cross-examination, she said that after Turner had first spoken to her she had turned around and came back to the front of his house in order to tell him she was calling the police. She also said that she had not given Turner a newspaper that day.

Turner testified that since a month after the strike began he has had signs in his yard saying, "No News/Free Press wanted here." On January 9, 1997, he was shoveling snow in his driveway with his 5-year-old grandson when Jones drove up and threw a newspaper on his lawn. He had seen her delivering newspapers in his neighborhood before but had not spoken to her. He called her "a fuckin' scab" and she began yelling something that he could not understand. A short while later a car came around the corner and pulled up on his lawn. A man got out and Jones told him that Turner had called her "a fuckin' scab." Both Jones and the man came up his driveway yelling at him. He told them that she had thrown a newspaper on his lawn and he did not want any delivered. The man told Jones to call the police, he got within a few inches of Turner with his fists clenched, and said he wanted to kick Turner's "ass." The man walked away, Turner went into his house, and a few minutes later the police arrived. He testified that he had not thrown his shovel, that he had not touched or grabbed the carrier, that he never got within 20 feet of her except when she came into his driveway, that he did not reach into her car, and that he did not break her necklace. On cross-examination, he denied that he had previously followed the carrier in his car. He said that it was not until after Jones was in his driveway with her fiance and returned to her car that she called the police. As of the date he testified, the criminal charges against him had not been resolved.

Analysis and Conclusions

I find that the Respondent has established that it had a good-faith belief, based on the statements given by Jones, that Turner had assaulted her by throwing a shovel at her vehicle and by reaching into her vehicle and grabbing at her cellular phone. I also find that these actions were coercive and intimidating and constituted serious misconduct under *Clear Pine Mouldings*.[94]

I find that the evidence does not establish that Turner did not engage in the misconduct for which he was discharged. Jones was a believable witness, her story was more plausible than Turner's, and her testimony at the hearing was consistent with the statements she gave immediately after the incident. I find no reason to credit Turner's self-serving denials over the testimony of Jones. The only other evidence adduced at the hearing was the report and testimony of Clinton Township police officer Roger Rossbach, who arrived at the scene after the confrontation had ended. Neither casts any doubt on Jones' veracity or her memory of the event.[95] I credit Jones' testimony that she did not throw a newspaper on Turner's property. It may have been unwise for her to turn around, stop in front of Turner's house, and announce that she was calling the police to protest his calling her names but, under the circumstances, it was not sufficient provocation to excuse

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[94] I find that his alleged harassment of Jones, by calling her names as she drove by his house, did not constitute serious misconduct that warranted disciplinary action.

[95] Rossbach's report concerning what he was told at the scene is consistent with Jones' testimony. The fact that he found no impression in the snow indicating where Turner had thrown the shovel is inconclusive and does not establish that it did not happen.

his responding by throwing a shovel at her vehicle and going around to the driver's side to reach inside and grab at her phone. Turner's actions initiated the incident and escalated it into a confrontation and assault. I find that counsel for the General Counsel have not proved that Turner's discharge was a violation of the Act. I shall recommend that this allegation be dismissed.

38. Discharges of Terrence Walkuski

Terrence Walkuski has been employed by the DNA as a pressman since the JOA. He was previously employed by the News, beginning in October 1979. He is a member of GCIU Local 13N. He went on strike on July 13, 1995, and has not returned to work. He testified that during the strike he did picketing. By letter, dated July 26, 1995, he was informed that he had been terminated for his actions on July 14, 1995. According to the letter, this involved smashing the passenger side rearview mirror on a van leased to the DNA and getting on and riding for some distance on the hood of a vehicle, endangering the lives of employees and contractors of the DNA. He received another letter, dated October 16, 1995, informing him that he was also being discharged for spitting in the face of a DNA carrier on September 11, 1995.

a. The July 14, 1995 Incident

Kelleher testified that he made the decision to discharge Walkuski for this incident after reviewing a Detroit Police report about it. Based on that report, he concluded that Walkuski had broken the side mirror of a van, jumped onto the van as it exited the Riverfront plant and rode on it for a period of time, and broke off one of its windshield wipers.

Walkuski testified that during the early morning hours of July 14 he was among about 200 pickets at the entrance to the Riverfront plant. At about 1 a.m., as he was picketing in the driveway, a van approached and crossed the picket line. The van came directly at him without stopping. He attempted to get out of the way but could not do so because of the people crowding all around him. The van kept coming towards him and when it touched his legs and began pushing against him, he dropped his picket sign and climbed up onto its bumper to avoid being hurt. The van did not stop and he stayed on the bumper, holding onto the roof with one hand and, with the other, the driver's side windshield wiper, which broke off in his hand. The van continued on for about 3 blocks without stopping until it was pulled over by the police. He was unable to get off sooner because the van was travelling about 10 miles per hour or faster and he could not safely do so. While this was going on, the driver and about four passengers inside the van were laughing. The police arrested him and charged him with malicious destruction of property under $100. He went to trial on this charge and was found guilty and paid a fine, costs, and fees in the amount of $230. He denied doing any damage to the side rearview mirror of the van.

David Schack testified that in July 1995 he was employed by APT as a security officer. On the first morning after the strike began, he was driving one of three vans that attempted to leave the Riverfront plant. As the first van reached the picket line, it was attacked, had its tires slashed and its radiator punctured and backed up from the line. About 10 to 15 minutes later, when things had calmed down, he pulled up to the picket line in the second van using a roll, stop, roll, stop method which he had learned in training to cross the line. While doing so, one of the pickets, who was later identified to him as Walkuski, climbed up onto the van while it was stopped and other pickets were beating on it with signs,

sticks, and other things. He drove forward with the picket hanging onto the van and later stopped and told him to get off the van but he would not do so. After driving about two blocks, he saw a police car, pulled over to it, and asked the police officers to remove the person from the van. They did so after a little bit of resistance on Walkuski's part. He inspected the van for damage and found a bent windshield wiper, scratches on the hood, and a broken windshield and rearview mirror. He did not see Walkuski damage the mirror. He later testified about this at Walkuski's criminal trial.

Douglas Masters testified that in July 1995 he was employed by APT as a security officer and was assigned to Detroit. On July 14, he was in the van driven by Schack when it crossed the picket line at the Riverfront plant. They were behind another van that was unable to exit because of the large crowd and had its tires flattened. They were told to proceed to the picket line, to stop and to slowly proceed through the crowd. When they stopped at the picket line, people gathered around the van and beat on it with picket signs and fists. A person, who was later identified to him as Walkuski, climbed up onto the front of the van, holding on to a windshield wiper and the antenna. As they proceeded slowly through the crowd, someone broke the van's side mirror with a stick. After they drove about a block, they stopped and asked the man to get off the van but he refused. They went a little further and saw a police officer whom they asked to remove the man from the bumper of their vehicle. When Walkuski got off the van one of the wipers was bent, there were some scratches and dents, the mirror was broken and there was a small crack in the windshield. He later testified at Walkuski's criminal trial.

Tony Logan is a police officer with the Detroit Police Department. He testified that, on July 14, he and his partner

were on patrol in the Vicinity of the Riverfront plant. He observed a van driving slowly towards them, about 5 miles per hour, and saw a person on the hood of the van holding onto the windshield wipers. The driver of the van beckoned to them and they pulled over and stopped. The van driver told them that the person on the front of the van was a picket, that he had smashed the mirror and jumped onto the van as they were exiting the plant, and that he refused to get off. Logan testified that when they approached the picket, whom they learned was Walkuski, he was aggressive and belligerent, and was shouting something about "scabs" at the police officers and the van driver. The police officers removed Walkuski from the van and placed him under arrest. Logan noticed that the wipers and the mirror on the van were damaged.

Analysis and Conclusions

I find that Walkuski was on strike at the time of the incident for which he was discharged, that it occurred at a picket line, and that the Respondent considered him to be a striker. I also find that the Respondent had a good-faith belief that Walkuski had impeded the progress of the van containing security personnel as it attempted to exit the Riverfront plant and that he had damaged the van by breaking the rearview mirror.[96]

There is no dispute that Walkuski climbed up onto the bumper of the van as it crossed the picket line while exiting the Riverfront plant on July 14. The only question is whether he did so intentionally or was forced to do so in order to

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[96] The Board applies the *Clear Pine* standard in assessing striker misconduct directed at nonemployees. *Aztec Bus Lines*, supra at 1027.

avoid being run over. Having observed his demeanor and considered the evidence as a whole, I did not find Walkuski to be a believable witness and do not credit his testimony. Although there were about 200 other picketers present at the time of this incident, no one testified in support of Walkuski's version. According to Walkuski, the large crowd of picketers was pressing so close around him, that it was impossible for him to move away from the van which continued to move forward without stopping. However, there is no evidence that anyone else in that crowd was unable to get out of the way, was forced to climb onto the van, or was injured because they did not do so. Based on the credible testimony of Schack and Masters, I find that the van did not proceed across the picket line without stopping, but did so by means of a series of "roll, stop" maneuvers. I find that Walkuski intentionally climbed up onto the van while it was stopped, in an apparent attempt to keep it from moving, while a crowd of picketers that had disabled and prevented another van from exiting a short time earlier was beating on it with picket signs, sticks, and fists.[97] I find that this constituted serious misconduct because it was an attempt to prevent the van from exiting the facility and to

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[97] Under the circumstances, I find that Schack acted reasonably in proceeding forward slowly in order to get away from the picketers, notwithstanding, the fact that Walkuski was clinging to the van. I find that there is no reason to believe that he was trying to frighten or injure Walkuski, that he did not give Walkuski an opportunity to get off the van as soon as it was safe to do so, or that he was responsible for prolonging the incident. On the contrary, the evidence establishes that the entire incident was precipitated and prolonged by Walkuski's reckless actions in climbing onto the van and, thereafter, refusing to get off until he was removed by the police.

facilitate the attack on it. See *GSM, Inc.*, supra at 175; *Stroehmann Bros. Co.*, 271 NLRB 578 (1984).[98]

Based on the foregoing, I find that the General Counsel has not established that Walkuski did not engage in the misconduct for which he was discharged and has not proved that his discharge was a violation of the Act.

b. The September 11, 1995 Incident

Kelleher testified that he made the decision to discharge Walkuski a second time for the incident on September 11, 1995. He did so after reviewing documents relating to the incident. The documents consist of (1) a copy of Walkuski's photo identification card; (2) an unsworn affidavit of Marvin Jackson, dated September 25, 1995; (3) a DNA-APT Report, dated September 13, 1995, by Ricardo Lopez, concerning his videotaping of a striker for identification purposes; (4) a picture of Walkuski, taken at 3:20 a.m. on September 13, 1995; and (5) an L.S.S. Investigative Sheet concerning a complaint that a striker spit on Desiree Wheeler on September 11, 1995, and the identification of Walkuski by Wheeler. Based on the information in these documents, he concluded that Walkuski had spit in the face of DNA newspaper carrier and should be discharged.

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[98] The evidence adduced at the hearing conclusively establishes that Walkuski did not break the rearview mirror on the side of the van. This makes no difference since his other conduct standing alone was sufficient warranted discharge. Moreover, Walkuski's own testimony establishes that he broke one of the windshield wipers while he was riding on the van and that he was found guilty of malicious destruction of property in a criminal trial arising from this incident for breaking the wiper.

Walkuski testified that, on the morning of September 11, he was picketing with other strikers at the Southfield Distribution Center. Around 3:30 or 4 a.m., a car crossed the picket line and went about 100 to 150 feet down the road, stopped, and backed up to where the pickets were standing. Walkuski said that he was standing on the passenger side of the car, about 5 or 6 feet away from it, when it exited. He denied that he had spit on anyone in the car. A man got out of the car and started yelling at the pickets and calling them names. While looking at Walkuski and apparently talking to him, the man said that someone spit on his car. Walkuski called the man a "scab" and striker Camel Gavin made some remarks to the man. Their argument got loud and the man came around the car towards them. He grabbed Gavin's picket sign and swung it at him. The police, who were sitting right next to the driveway, came over and arrested Gavin and another striker, Ellison Summerville.

Desiree Wheeler testified that she has been an independent contractor, delivering the Free Press, since February 1995. On September 11, 1995, she went to the Southfield Distribution Center with her fiance Marvin Jackson to pick up newspapers for delivery. As they were leaving the distribution center, they had to slow down to let pickets in the driveway pass by. As they drove slowly forward, a white male, whom she did not know but was later identified to her as Walkuski, walked up to the car and spit in her face through the window which was rolled down about 9 or 10 inches. She said that she was stunned but after a few moments told Jackson what had happened. He stopped the car and backed up near the driveway. He got out of the car and asked the man if that was the way the union conducted its business, by spitting in a woman's face. Walkuski responded by calling him "a scab." At that point, two other pickets approached Jackson and got into an altercation with him which was broken up by the

police. She identified Walkuski from his picture in the record as the person who spit in her face that night.

Marvin Jackson has been delivering newspapers as an independent contractor for the DNA since 1992 or 1993. He testified that during the early morning of September 11, he and his fiancee Desiree Wheeler went to the Southfield Distribution Center to pick up newspapers. As they were leaving, they stopped to let some pickets pass by. As he drove forward into the street, he heard Wheeler let out a loud squeal. She said that one of the pickets spit in her face. She identified the picket who did it and he backed up the car a few feet to where Walkuski was standing. He got out of the car and started talking to Walkuski over the top of the vehicle. Jackson asked him if that was how the union conducted its business. At that point, another picket came around the car, told him "you got what you deserved," and struck him with a picket sign. After a short altercation with him and another picket, the police intervened and arrested both pickets. He identified Walkuski from a picture in the record as the person Wheeler had pointed out to him as the one who spit on her. Jackson did not see Walkuski spit on Wheeler.

Camel Gavin, one of the pickets who was arrested after scuffling with Jackson, first testified that when Jackson returned to the picket line, he accused Gavin of spitting on his car and fiancee. However, on cross-examination, after being shown the transcript of his testimony at his criminal trial, he admitted that Jackson directed his remarks to Walkuski. He said that he did not see Walkuski spit at the car when it exited. In fact, he testified: "I didn't see anyone do anything." Ellison Summerville, the other picket arrested that night, testified that when the car exited he was sitting at a table about 15 or 20 feet away, fixing coffee and talking to someone. He did not see anyone spit on or into the car.

Analysis and Conclusions

I find that Walkuski had gone out on strike prior to the time of this incident and had not returned to work, that it occurred at a picket line, and that the Respondent considered him to be a striker. I also find that the Respondent had a good-faith belief that Walkuski spit in the face of Desiree Wheeler as she crossed the picket line in a vehicle on September 11, 1995.

This is a matter of credibility. I credit the testimony of Wheeler that Walkuski spit on her. Her testimony and that of Jackson that she was spat upon is uncontradicted. There is no reason to doubt Wheeler's testimony that she saw Walkuski do it or that of Jackson that she identified Walkuski to him immediately after the incident happened.[99] Walkuski admits to being present when the incident occurred, but denies that he did it. The testimony of Gavin and Summerville does nothing to support Walkuski. While both denied seeing anyone spit at Wheeler, neither established that he was in a position to see Walkuski when the incident occurred and neither affirmatively testified that Walkuski did not do it.

The remaining question is whether Walkuski's act of spitting on Wheeler is serious misconduct of the kind encompassed by the *Clear Pine Mouldings* standard.[100] Under

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[99] I find what would otherwise be hearsay testimony by Jackson as to what Wheeler said is admissible and probative. It was a part of the res gestae of the incident and comes within the present sense impression or the excited utterance exceptions to the hearsay rule, or both. See Fed.R.Evid. 803 (1) & (2).

[100] That question was left open by the Board in *Domsey Trading Corp.*, 310 NLRB 777, 778 fn. 4 (1993).

the circumstances presented here, I find that it is. This was not an inadvertent consequence of someone talking or shouting. See *Domsey Trading Corp.*, 310 NLRB 777, 809 (1993). It involved a deliberate, unprovoked, and despicable act of spitting in the face of an unsuspecting person. Such conduct is intimidating and unacceptable in any context. There can no justification for subjecting anyone to it in order to lawfully cross a picket line. I find that, in this context, Walkuski's spitting on Wheeler was no less of an assault than striking her, in terms of the coercive and intimidating effect, and that it should be treated the same way. See *Noblit Bros.*, 305 NLRB 329, 386 (1992).

I find that counsel for the General Counsel have not established by a preponderance of the evidence that Walkuski did not spit in the face of Wheeler on September 11, 1995. Consequently, they have not established that Walkuski was unlawfully discharged for that incident or proved a violation of the Act. I shall recommend that these allegations be dismissed.

39. Discharges Resulting from Picketing at the Hayes Distribution Center on August 29, 1996

On August 29, 1996, picketing took place at the entrances to the Hayes Street Distribution Center in Roseville, Michigan, from about 11 a.m. to 12:30 p.m. As a result, The Free Press discharged its employee Chris Manoleas and the DNA discharged its employees Glenn Anderson, Michael Burke, Frank Ciaramitaro, James Cichy, Lawrence Croxon, James Daniels, Ronald DeLaura, Shawn Ellis, John Gerhardt, Gabriel Glowacki, Randy Karpinen, Mildred Kenyon, Douglas McPhail, Eugene Nawrot, Michael Nippa, Randall Runevitch, Jess Saxton, Richard Stringer, Melvin Townsend, Scott Uhazie, Diane Valko, and Michael Youngmeier. The

reason given for all of the discharges in the letters sent to all of the employees was that they "physically blocked ingress and egress of traffic" to the Hayes Distribution Center. The letters also state that their conduct was "even more egregious in that it violates a formal NLRB Settlement Agreement prohibiting such behavior."

Kelleher testified that he made the decisions to discharge the DNA employees involved after looking at videotapes of the incident and reviewing certain documents. The documents were (1) copies of the photo identification cards of all of the employees who were discharged; (2) a DNA-APT Incident Report, dated August 29, 1996, by James Delebar, stating that he observed and documented union members and supporters engaged in mass picketing and impeding a DNA truck from exiting the Hayes Distribution Center on that date; (3) an unsworn affidavit of John Taylor, dated August 29, 1996, stating that he was at the Hayes Distribution Center from about 12 noon to 12:15 p.m. on that date, that he observed a number of pickets blocking ingress and egress to the facility, and that he recognized one of the pickets as Chris Manoleas from seeing him there and in videotapes of the scene; (4) an unsworn affidavit of Ali Alqirsh, dated August 30, 1996, stating that as he began to drive his truck out of the Hayes Distribution Center, at 10:30 a.m. on August 29, he saw about 50 pickets in the driveway, that when he got about 15 feet from the entrance, he saw a cement block on the ground, that he did not want to run over the block and possibly damage his truck, that after sitting in his truck for a half-hour he backed up and called his dispatcher to say he could not get out, that after another half-hour the police escorted him through the picket line, and that the delay prevented him from making all his scheduled stops that day; (5) a memo, dated August 29, 1996, and a sworn affidavit, dated August 30, 1996, by Kevin McLogan, stating that he

observed pickets begin to congregate around the driveway to the Hayes Distribution Center on August 29, at about 11:05 p.m., that a truck making a delivery was unable to leave for about 45 minutes because of the number of pickets who were blocking the entire width of the driveway; that the police were called but failed to disperse the pickets; and that carriers were told to stay put and did not enter the facility until police cleared the way at about 12:10 p.m.; and (6) unsworn affidavits by Anthony Buhagiar, Jay Kaufmann, Robert Hattis, Richard Fischer, and Larry Darnell, stating that they had been shown videotapes of the scene and had identified various employees with whom they were acquainted as being involved in the picketing. Kelleher said that he was also aware of and considered the NLRB settlement agreement and Sixth Circuit Order when he made these decisions. Based on the foregoing, he determined that all of those employees, who had been identified as being among the pickets, had been blocking ingress and egress to the Hayes Distribution Center on August 29, 1996, that it was a violation of the Board's Order, that it was absolutely wrong, and that they should be terminated. He also considered the fact that the truckdriver said that he could not get out of the facility because of the concrete block in the driveway and because he was fearful of the pickets.

Taylor recommended to Meriwether that Free Press employee Manoleas be discharged for his participation in the Hayes incident on August 29, based on his personal observation of the incident, videotapes, and his personal identification of Manoleas. Meriwether testified that, based on Taylor's recommendation, he made the decision to terminate Manoleas because he was blocking ingress and egress to the Hayes facility which violated the NLRB settlement agreement and the Sixth Circuit's Order.

Kevin McLogan testified that on August 29, 1996, he was a product manager at the Hayes facility and was present that day. He was told that there were pickets gathering out on Hayes Road at about 11:05 a.m. He told the truckdriver who was there dropping off newspapers to get out as fast as possible and called security and the Roseville Police. About 11:15 a.m., there were about 40 pickets walking in a circle around the width of the driveway. About that time, the truck driver attempted to leave but was unable to do so because there were too many pickets. At about 11:30 a.m., he noticed the cement block in the driveway for the first time. He did not see it put there and does not know who did so. He believes that it was later removed by APT guards. He testified that about that time carriers started to arrive but could not get into the driveway and drove by. The police arrived and he informed one of them about the restraining order and gave him a copy. At about 12:05 p.m., the police started to let some people in. He said that normally some carriers have arrived by 11:30 a.m., that they leave between around 11:45 to around noon, but that day they did not leave until about 12:45 p.m. because there were pickets present and "we weren't letting them leave until . . . the pickets had subsided." On cross-examination, he said that when the truck began to leave the driver went to within about 25 feet from the picket line, stopped and was directed by McLogan to back up close to the distribution center. He also said that district supervisors called carriers that day and told them to wait and to not come to the distribution center at the normal time. He said this was done because he was concerned about their safety and the possibility of violence. When carriers did arrive, the police lined their vehicles up and brought them through the picket line in groups, as had been done on other occasions during the strike prior to the summer of 1996.

Ali Alqirsh testified that he is employed by the DNA as a truckdriver. He was delivering newspapers to the Hayes Distribution Center on August 29, 1996, and as he was about to leave at approximately 10:30 a.m. he saw a concrete slab and a bunch of people circling around in the driveway. He said that he stopped his truck about 15 feet from the driveway because he did not want to risk hurting anyone and because somebody might throw rocks at him. He said that, while he sat there, the pickets called him "scab" and other names and said they were going to kick his "ass." One of the pickets came to his truck and tried to give him a leaflet but he rolled up his window and refused to take it. After about a half-hour, he backed up to the facility to call his dispatcher to report he was being delayed. The dispatcher told him to wait. A little after noon, the police told him they would make a way for him to leave and he drove through the picket line guided by the police. He estimated that he waited an hour and 45 minutes before leaving the facility.

Taylor testified that on August 29 he was contacted by McLogan who informed him that blocking was occurring at the Hayes facility. He was driven out there by a security officer and observed picketing going on and a concrete curb or barrier in the driveway. They attempted to enter the facility but could not do so and drove around to an island in the street. He approached a plainclothes police officer whose name he could not recall, identified himself, said he wanted to get in, and gave him a copy of the NLRB settlement agreement. The police officer told him that the cars should line up and that at a convenient time he would clear the pickets and allow them to enter. This was done after another 10 minutes. After he entered the facility and was briefed by McLogan, he went outside and observed the picket line. After 15 to 30 minutes, the police again opened the picket line and

let some more people in. He was there for about an hour before the crowd dispersed.

Randy Karpinen was one of those discharged for his participation in the picketing at the Hayes facility. He testified that he was part of a group that met each morning at the UFCW Local 876 union hall in Madison Heights about 10 a.m. and from there would go to various locations to picket or distribute leaflets. On August 29, 1996, they were directed by Mike Zielinski, an international field representative of the Teamsters, to picket the Hayes facility. When he arrived there about 11:10 a.m., there were about 12 pickets present and there was a concrete parking tie in the driveway. They picketed in the public access on Hayes Road in front of the driveway until about 12:30 p.m. He saw a DNA truck near the building which drove to about 30 feet from the picket line and stopped. After about 15 minutes, the truck backed up near the building and later crossed through the picket line when the police parted the pickets. The police waved cars to line up in a left turn lane on the other side of the road and, on at least 2 occasions, opened up the picket line to escort the cars into the facility. He said that when the police were ready to have the cars enter, Deputy Chief Heinz would tell Zielinski who would tell the pickets who would move aside when directed to do so. He said that he had picketed at the Hayes facility a few weeks before and that the police used the same procedure to get vehicles in and out. He testified that he was aware of the Sixth Circuit Order prohibiting blocking ingress and egress to DNA facilities and that they were cautioned by Zielinski not to block the driveway. Karpinen said that he was a marshal that day and directed the pickets to keep moving in a circle in the driveway. He testified that the entrance was not blocked and that the pickets complied with all of the procedures put in place by the police.

Zielinski testified that each day a group of strikers met to organize strike activity. On the morning of August 29, 1996, about 10:40 a.m., he announced that they would be picketing the Hayes Distribution Center. He said that one of the things he did was to go over the "do's and don'ts" of picketing telling them that it was to be legal and peaceful and that they should not block any entrances to DNA property. After the meeting ended, he drove to the Hayes facility and was one of the first four or five people to arrive there. The parking curb was already in the driveway and he did not know how it got there. He said that there was room on either side of the curb and that it did not interfere with the ability of vehicles to enter the driveway. There was a DNA truck parked 30 to 40 feet back from the driveway and the driver was sitting inside reading a newspaper. By 11:30 a.m., most of the 40 to 50 picketers had arrived. He said that the first police officer arrived a couple of minutes after he got there and eventually there were about 20 police officers at the scene. Zielinski said that Deputy Chief Heinz arrived about 5 minutes later and he told him they were there to conduct a peaceful picket line and they would cooperate with the police and follow their instructions. Heinz told him that his officers would direct the traffic in and out of the facility as they had done in the past by lining up vehicles and bring them through the picket line in groups. As vehicles approached the entrance, the police directed them to go down the road and line up on the median. Heinz informed him when the vehicles were to enter and he communicated this to the pickets. The same was done with respect to the DNA truck when it exited the facility. The pickets left after about an hour. Zielinski said that he was aware of and familiar with the content of the Sixth Circuit's Order. He said that they followed the instructions of the police who were in charge of the scene that day.

Richard Heinz is the deputy chief of the Roseville Police Department. He testified that about 11 a.m. a call was received that strikers were congregating at the Hayes Distribution Center. He sent officers to keep an eye on things, called for assistance from other jurisdictions, and went to the scene himself. When he arrived he spoke to someone at the facility and with one of the picket captains. He said that there had been situations that had gotten out of hand at that site in the past and he did not want anyone to get hurt or have any property damaged. For safety purposes, he decided to have the vehicles seeking to enter the facility line up in the turn around lane and when five or six were there he would have his officers open the line and run the vehicles through at one time. This was done about four times that day. The officers opened the line by walking between the picketers and the vehicles. When the police approached the picket line some picketers moved aside and others had to be pushed back by the officers. No one was arrested that day. The Sixth Circuit Order was brought to his attention that day but it did not affect his procedure.

Analysis and Conclusions

I find that the Respondents have established that they had a good-faith belief, based on the affidavits of Taylor, Alqirsh, Delebar, and McLogan, that those participating in the picketing at the Hayes Distribution Center on August 29 had blocked ingress and egress to the facility. This constituted serious misconduct under *Clear Pine Mouldings*. I also find that the subjective impressions and conclusions expressed in those largely conclusory affidavits are not supported by the evidence and that the evidence as a whole shows that those who were discharged did not engage in serious misconduct.

There is little dispute about what occurred and much of the incident is on videotape. The evidence shows that a large group of picketers continuously patrolled in the driveway at the Hayes facility for about an hour and a half.[101] It also shows that, as a result of the procedures set up by the police official in charge of the scene to assure the safety of all concerned, some of those seeking to enter the facility may have been delayed in doing so. No carrier was called as a witness. However, it is clear that there were vehicles, including that in which Taylor was riding, that the police required to line up in the left turn lane and remain there until the police led them into the facility as a group. I find that this does not establish that the pickets blocked ingress or egress to the facility or that they violated the NLRB settlement agreement or the Sixth Circuit's Order.

The Respondents argue that, pursuant to the agreement and Order, they were entitled to have people freely enter and leave their facilities without having to resort to police escorts. I do not disagree. However, the evidence shows that the police were summoned immediately after the pickets arrived and began to set up their picket line. There is no evidence that at that point there had been any violence or that they had actually prevented anyone from entering or leaving; consequently, there was no misconduct which could be reasonably said to have coerced or intimidated employees in the exercise of their Section 7 rights. As a practical matter, once the police arrived and took control of the scene, all parties were subject to their control and direction. The fact

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[101] There is no evidence that any of the discharged employees were responsible for the cement curb being in the driveway. In any event, it is clear from the videotapes that its presence had no effect on the ability of vehicles to enter or leave the facility.

that the procedure Chief Heinz put in place, in the exercise of his discretion, may have delayed someone from entering or leaving the facility did not convert peaceful and lawful picketing into serious misconduct.

The Respondents argue that if the picketers had not showed up at the Hayes facility, no one would have been delayed or inconvenienced that day. This may be true, but it does not follow that because they did show up and engage in peaceful picketing, they engaged in serious misconduct and forfeited their rights to employment. To accept the interpretation the Respondents put on the NLRB settlement agreement and Sixth Circuit's Order would in effect render meaningless rights protected by the Act, including the right to picket. The incident involving the DNA truck is a good example. The driver, Alqirsh, said that as he began to leave the facility, he saw a picket line at the entrance to the driveway. He stopped his truck about 15 feet away from the picket line, went no farther, and made no attempt to cross it. He said that he feared injuring someone or having rocks thrown at him.[102] He then backed up and waited, as directed by his dispatcher, for at least 30 minutes until the police guided him through the picket line. The videotape shows that when the truck actually approached the picket line at 12:03 p.m., the pickets moved out of the way and it exited without incident. Although Alqirsh stated that arriving pickets rushed to the entrance as he attempted to leave, the testimony of McLogan indicates this was untrue. According to McLogan, when he saw the pickets congregating he tried to get Alqirsh

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[102] The driver admitted that he had previously driven through picket lines during the strike and there is no evidence that there were any rocks thrown at him on August 29 or that he had any reason to believe there would be.

to complete his delivery and leave, but he did not do so for another 10 or 15 minutes. When he finally did get into his truck, he went no closer to the picket line than 25 feet. The Respondents also contend that carriers were blocked from entering and leaving the facility. However, McLogan testified that once he saw the picket line forming, at his direction, carriers were called and told not to come in. Those, who arrived before the picket line was set up or were escorted in by the police, were not allowed to leave by McLogan while the picketing was going on. Although he said this was done because "there was a possibility for violence," he offered no reasonable basis for believing that under the circumstances violence was likely. There is none shown on the videotapes of the incident. McLogan called the police as soon as he saw the pickets arriving and there was a large police presence throughout.[103] The videotapes and other evidence show no violence or threatening conduct by the pickets and there is nothing that indicates that there was a likelihood of violence. I find that throughout the picketing the pickets were engaged in the kind of "peaceful patrolling" that is protected by the Act. See *Clear Pine Mouldings*, supra at 1047.

In essence, the Respondents contend that because the truckdriver, from 15 or 25 feet away, saw a picket line in front of the driveway, which he decided to make no effort to cross until the police escorted him through, and because McLogan decided that carriers should not attempt to cross the picket line, the picketers unlawfully blocked ingress and egress from the facility and thereby engaged in serious misconduct. If such a subjective standard of what constitutes

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[103] McLogan's testimony that the police did not arrive until after 11:30 a.m. is contradicted by the testimony of Chief Heinz and the police report in evidence.

misconduct is applied, no picket line, no matter how peaceful and orderly, could be maintained. Obviously, an objective standard must be applied. The videotapes show that when the DNA truck actually approached the picket line, the pickets moved out of the way and it exited without difficulty. The same is true of the vehicles that were lined up by the police and periodically escorted into the facility. As the police entered the driveway, the pickets parted and did not interfere with the vehicles as they entered.

The Respondents also assert that the fact that the videotapes show a white vehicle that pulled up next to the picket line, waited for about 15 seconds and then drove off without entering is evidence that the picketers blocked its ingress to the facility. I do not agree. There is nothing in the record establishing who was in the vehicle or that it was attempting to enter the facility and was prevented from doing so. The videotapes show that Chief Heinz and another police officer were within a few feet of the vehicle while it was stopped. It is clear that the vehicle arrived after Chief Heinz had set up the procedure to be followed by vehicles seeking to enter the facility which called for them to line up and enter as a group. The same is true with respect to the vehicle in which Taylor was riding. The procedure for entering the facility was put in place by the police commander in charge of the scene and was a reasonable accommodation to the rights of all parties.[104] The Respondents' contention, that the pickets prevented carriers and others from entering or leaving the facility before the police arrived, is based on the general,

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[104] The Respondents' assertion that Chief Heinz said that he put the procedure in place because the picketers would not clear the driveway voluntarily and that the police had to force open the picket line misstates his testimony.

conclusory testimony of McLogan which I do not credit.[105] That testimony fails to identify any specific individual, other than Alqirsh, that was allegedly prevented from entering or leaving and was completely lacking in detail. He appeared more interested in supporting the Respondents' case than giving a factual account of what he had seen.[106] As discussed above, the evidence fails to establish that Alqirsh was prevented from leaving by the pickets. I find no reason to believe that McLogan's conclusions were any more accurate with respect to those he claims were blocked from entering the facility by the pickets.

In summary, the evidence as a whole shows that the employees discharged by the Respondents for participating in the picketing on August 29, 1996, at the Hayes Distribution Center were at all times involved in peaceful patrolling near the entrance to the facility. It fails to establish that they unlawfully blocked ingress or egress to the facility or that anyone who actually approached the picket line was prevented from entering or leaving because the pickets refused to get out of the way and let them pass. It also fails to establish that they

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[105] The Respondents' assertion that Chief Heinz testified that the picketers would not let vehicles pass through the picket line, is incorrect. He testified that he did not see any vehicle attempt to enter or leave, but that he "was told that they wouldn't let anybody pass." Likewise, Zielinski's testimony that the picket line never parted to let vehicles in or out does not establish that any vehicle was in fact prevented from doing so.

[106] McLogan also stated in his affidavit about the incident that he had "observed that the picketers had placed a long cement curb block in the middle of the driveway." At the hearing, he admitted that he had not seen anyone do so and that this was his "conclusion."

violated the NLRB settlement agreement or the Order of the Sixth Circuit enforcing that settlement. Shortly after the picketing began, the police arrived, took charge of the scene and set up a reasonable and appropriate procedure for entering and leaving the facility with which the pickets complied. I find that the evidence establishes that the pickets did not engage in serious misconduct and that their discharges violated Section 8(a)(3) and (1).

40. Discharge of Michael Burke

Michael Burke has been employed by the DNA since the JOA as a warehouseman. He had previously worked for The News as a district manager. He is a member of Teamsters Local 372. He went on strike on July 13, 1995, and has not returned to work. He testified that during the strike he did picketing at the North Plant and leafleting at stores and businesses. By letter, dated September 18, 1996, he was notified that he was being discharged for blocking ingress and egress at the Hayes Distribution Center on August 29, 1996. As discussed above, I have found that those picketing at the Hayes facility on that date did not engage in serious misconduct and that their discharges violated the Act. In Burke's case, there is also a question as to whether he was one of those present at the Hayes facility on August 29. He says that he was not.

Kelleher made the decision to discharge the DNA employees involved in the Hayes incident. He testified that he did not know who Burke was and that he relied on the affidavit of Kevin McLogan, in which he identified Burke as one of the picketers.

McLogan testified that he knows Burke, having worked with for 9 years, and that he saw him at the picket line at the

Hayes Distribution Center on August 29. He said that he last worked with Burke in January 1993 and that, prior to August 29, 1996, he last saw him at a company picnic in July 1994. At the hearing, he was shown a videotape of the Hayes incident and in several different instances pointed out a man wearing a blue shirt, jeans, a hat with buttons on it, and glasses whom he identified as being Burke.

Burke testified that he has been employed at Bethlehem Lutheran Church and School as a janitor since December 26, 1995, and arrived there to work at 9 a.m. on August 29, 1996. He worked stripping and washing the gym floor for about 3 hours and around noon went to lunch at Stella's, a nearby restaurant, with the school's secretaries, Judy Koller and Debbie Blight. They did this because the school had a half-day. Normally, he would have lunch at the school with the students. They returned from the restaurant after about 30 to 45 minutes and he washed the gym floor again and waxed it, which took about 2-1/2hours. Next, he waxed all the bathroom floors in the school and the church, which took about 2 hours. He went home at about 6 p.m. He said that, except for lunch, he did not leave the premises during the day. He said that if he has to leave the premises during the workday, other than for lunch, he notifies one of the secretaries, the school principal, or the pastor. He fills out a time slip showing his hours each day and turns it in every 2 weeks. His time slip for the period including August 29, 1996, in the record, shows he worked from 9 a.m. to 6 p.m. He does not sign out for lunch because he is entitled to a paid hour for lunch. Burke testified that the Hayes Distribution Center is about 2 miles from the church, but that he has not been there since 1992, when his son had a newspaper route. He said that he did his leafleting in the morning around 7 a.m. and that he was not part of the group that met at the UFCW Local 876 union hall mornings during the summer of

1996. He was shown the videotape at the hearing and denied that he was shown in it or that he was the person that McLogan had identified as being him.

Analysis and Conclusions

As discussed above, I have found that Kelleher had a good-faith belief, based on affidavits, that the picketers, including one identified as Burke, had blocked ingress and egress to the Hayes facility on August 29, 1996. I also find that the General Counsel has established by a preponderance of the evidence that Burke was not present and did not picket at the Hayes facility that day.

I found Burke to be an impressive and believable witness and credit his testimony about his whereabouts on August 29, 1996. His testimony was partially corroborated by the testimony of Judy Koller, one of the secretaries at the church and school where Burke was working. She credibly testified that she was working there on August 29, as was Burke, although she was not with him at all times during the day. She was aware of the date because Burke had told her about his discharge about 2 weeks later and she had checked the calendar.

While there is substantial credible evidence that Burke was at the Bethlehem Lutheran Church and School and not at the Hayes Distribution Center on August 29, there is even stronger evidence that the person McLogan identified in the videotape is not Burke. Koller said that she has known Burke for approximately 10 years and that, in August 1996, his hair was shoulder-length or longer. She has seen him wear a hat and that when he does he wears his hair down and does not tuck it up into the hat. She was shown the videotape and asked about the person that McLogan had several times

identified as Burke. She said that the person was not Burke and that she did not know who it was. Burke's wife of 24 years, Sandra, also appeared as a witness and was shown the same videotape. She denied that the person McLogan had identified as Burke was her husband. She noted that the person is much thinner and does not have long hair. In August 1996, Burke's hair was at least 12 inches long. She also said that she is familiar with the Teamsters hat that Burke wore when picketing. It had many round pins on it as well as two square pins that she had made for him. She said that the hat in the videotape was not Burke's. Randy Karpinen, who was a picket captain at the Hayes picket line testified that he did not recall seeing Burke there that day. He was shown the videotape at the hearing and said that he did not see Burke in it.

I find that the foregoing credible testimony that Burke is not the person shown in the videotape far outweighs McLogan's claim that he is. He had seen Burke only once in 3 years prior to August 1996 and apparently was unaware that he had shoulder-length hair. It is obvious from the videotape that the person does not have shoulder-length hair pushed up under the hat that he is wearing, as McLogan suggested. Although Burke was a long-time employee of the Respondents, no other company witness was called to corroborate McLogan's identification. I find that Burke was not among those picketing at the Hayes Distribution Center on August 29, 1996, and that his discharge violated Section 8(a)(3) and (1), regardless of whether or not that picketing constituted serious misconduct.

41. Discharges Resulting from the Rally on August 30, 1996

On August 30, 1996, Friday, of the Labor Day weekend, a rally in support of the strike was held in front of The News building on West Lafayette Boulevard. Organizers set up a podium and microphone for speakers to address the strike supporters on the stoop area at the top of the steps leading to the front doors of the building. The doors are intended for use by members of the public entering to transact business or meet with newspaper personnel. There is another door on Third Street for employees. The front doors lead to a lobby that has a counter where the public can place classified ads and purchase back copies of the newspaper and other items. The counter is normally open for business on Friday mornings, which is usually busy because of an early deadline for placing ads for weekend editions of the newspaper. The front doors are electronically activated by means of sensors that cause them to slide open when approached from the outside or inside. The stoop in front of the doors can be reached from the outside by the steps or by two handicap ramps, one on either side of the building.

The evidence indicates that the rally was organized on short notice to coincide with a visit by several national labor leaders, including, AFL-CIO President John Sweeney and Secretary-Treasurer Richard Trumpka. Many union officials and dignitaries, including, Congressman John Conyers, Bishop Thomas Gumbleton, and Detroit City Council Member Mary Ann Mahaffey, attended and addressed a crowd which eventually reached more than 300. There is no evidence that any permits were requested or issued in connection with the rally. There is also no evidence that any of the Respondents gave permission to use the steps or stoop in front of the building for the rally, but also none that they

sought to prevent the rally from taking place or to interfere with it in any way. The crowd began gathering after 9 a.m. and remained in the area until past noon. After the speeches concluded, about 40 to 50 people sat down on the steps. They were asked to leave by the police and when they did not, they were arrested. Striking employees of all three Respondents were discharged because of this sit-down at the end of the rally. Eighteen of those discharges are being contested here. The DNA employees are Shawn Ellis, Melanie Francis, Jack Howe, David Mills, Gary Rusnell, Rick Torres, Alex Young, and Ann Marie Znamer; The News employees are Kathleen Desmet, Allen Lengel, Robert Ourlian, Scott Martelle, and Claudia Pearce; and The Free Press employees are Nancy Dunn, Emily Everett, Daymon Hartley, Margaret Trimer-Hartley and Susan Watson.[107] All were informed by letters that they were being discharged for blocking ingress and egress to the front entrance to the building on August 30.

Kelleher testified that he made the decisions to discharge the DNA employees. He was present at The News building that day and had observed the rally. He viewed videotapes and photographs taken that day, and a number of documents before making those decisions. The documents were (1) a sworn affidavit of John Taylor, dated August 30, 1996, describing his observations of the picketers outside The News building that day and identifying certain persons that he recognized who were sitting down and blocking ingress and egress to the building; (2) a DNA-APT incident report, dated August 30, 1996, by security guard Steven Lee, stating that

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[107] Dunn, Hartley, Howe, Lengel, Ourlian, Pearce, and Young held some local union office at that time, as did Sam Attard and Patrick Coffey, who were similarly discharged but the complaint allegations concerning them have been withdrawn.

he observed and videotaped mass picketing in front of The News building from 9:54 a.m. to 12:19 p.m. on that date; (3) a DNA-APT incident report, dated August 30, 1996, by Steven Lee, stating that he observed and videotaped approximately 30 picketers sitting down and blocking the front entrance to The News building from 11:48 a.m. to 12:19 p.m. on that date; (4) a sworn affidavit of Mary Ann Frazier, dated September 19, 1996, stating that she is a security supervisor at The News building and is familiar with activity in the lobby, that she was in the lobby on August 30 from 10:30 to 11:30 a.m. and saw no one enter or leave through the front entrance which was unusual for that time of day; (5) a sworn affidavit of Joseph D. Palmer, Jr., dated September 19, 1996, stating that he is a security guard at The News building and is familiar with activity in the lobby, that he was in the lobby on August 30 for most of the time between the start of the rally at 10 a.m. until noon and saw only about 5 people approach the front entrance, while normally there might be 20 to 30; (6) a sworn affidavit of Harriet Perry, dated September 19, 1996, stating that she works at the counter in the lobby of The News building, that she was in the lobby on the morning of August 30 between the start of the rally at 10 a.m. until noon and serviced only about 5 people at the counter, while normally there might be 10; and (7) several unsworn affidavits of persons who identified certain of the people appearing in photographs of the scene of those sitting down outside the front entrance to The News building on August 30, 1996. Based on the foregoing, he concluded that those, who sat down in front of the entrance and were arrested, had blocked the ability of people to enter the building and had violated the Board's Order and that of the Sixth Circuit and that they should be terminated. He testified that he observed about 300 people at the rally in front of the building and that he did not discharge

anyone for attending the rally or picketing that day or because he or she was a union official.

The decisions to discharge The News employees involved in the sit-down at the end of the rally were made by Giles, with the exception of Martelle who was not discharged until after Mark Silverman had succeeded Giles as Publisher of The News. Giles testified that he was not present at The News building that day but he reviewed (1) videotapes of the event; (2) a Sunday Journal article about the event by Robert Ourlian; (3) Taylor's August 30, 1996 affidavit about the event; (4) photographs of the scene which appeared in union publications; and (5) the photo identification cards of all those employees who had been identified as being involved. Based on the foregoing, Giles concluded that the employees had violated the settlement agreement and the Sixth Circuit Order by blocking ingress and egress to The News building. Silverman testified that he made his decision to discharge Martelle after reviewing information provided by Taylor. The information consisted of (1) Taylor's affidavit about the event; (2) photographs of the scene which appeared in union publications; (2) the August 30, 1996, DNA-APT incident report by Steven Lee, stating that he observed and videotaped mass picketing in front of The News building; (3) the affidavits of Frazier, Palmer, and Perry about the event; (4) an sworn affidavit of Joe Michnuk, dated March 19, 1997, stating, inter alia, that he had reviewed a photograph of the scene and had identified Martelle as among those sitting down in front of the entrance to The News building; and (5) Martelle's photo identification card. Based on these materials, Silverman concluded that Martelle should be discharged because his sitting in front of the main door to The News building and blocking ingress and egress to it violated the Sixth Circuit's Order and the Board's agreement.

The decisions to discharge The Free Press employees involved in the August 30 sit-down were made by Heath Meriwether, the Publisher of The Free Press. He testified that his decisions were based on the recommendations of John Taylor that the employees be discharged. He also looked at a Sunday Journal photograph showing the sit-down at the end of the rally in which he recognized Dunn, Everett, and Watson. He concluded that they had blocked the entrance and exit to the building and had violated the settlement agreement that the unions had made with the NLRB. Taylor testified that his recommendation was based on his observation of the people blocking of ingress and egress to the News building by sitting down in front of the entrance. He personally saw Daymon Hartley and Watson and the others were identified to him by persons familiar with them who looked at pictures of the scene.

The credible and uncontradicted testimony of several local union officials, including, GCIU Local 13N President Jack Howe, Typographical Union No. 18 President Sam Attard, Teamsters Local 2040 President Alex Young, and Teamsters Local 372 Principal Officer Alfred Derey, called as witnesses by the Respondents, establishes that the August 30 rally was organized on short notice by international union representatives to coincide with the presence of Sweeney and Trumpka in Detroit. The local union leaders were contacted on August 29 or 30 and asked to notify their members and ask them to attend. It was prearranged with the Detroit Police that, at the end of the rally, after the speeches, Sweeney and Trumpka and others would be arrested. The purpose of these arrests was to create a "photo opportunity" to publicize and build public awareness of and support for the strikers' cause. All of the witnesses testified that they were generally aware of the settlement agreement with the Board and the Sixth Circuit Order which prohibited blocking ingress and egress to

the Respondents' facilities. They also testified that they did not believe they were in violation of either on August 30 because marshals had been posted with instructions to keep open the ramps leading to the front doors, there were police present to assure that the ramps were accessible throughout the rally, and because, by the time of the sit-down demonstration, the doors had been locked and barricaded for more than an hour.

Detroit Police Lieutenant James Noetzel testified that in August 1996 he was assigned to the First Precinct, which included area around The News and The Free Press buildings. He has been present for many demonstrations near The News building during the strike. He said that the mission of the police was to see that nobody was injured during the demonstrations. When it looked like a large crowd would be gathering near the building, the police would order the building security to lock the front doors to insure that nobody would enter or leave through those doors. There were other doors to be used and the police would direct people to use another entrance. During the demonstrations, to keep anyone outside or inside the building from getting hurt, police officers would be placed at each end of the ramps and at the top of the steps to make sure that no one would press against the glass and possibly cause it to shatter. He said that there were dozens of demonstrations at The News building in which this procedure had been followed. He was present at The News building on August 30. The police had been notified beforehand and when the crowd gathering in front of the building reached about 100, he ordered that the doors be locked.[108] At the end of the rally, approximately two dozen

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[108] The videotape indicates this was done sometime after 10 a.m.

persons, including several "celebrities," sat down on and around the front steps. A police inspector asked several times that they move. Thereafter, only those persons who were sitting down and had refused to move were arrested and taken to a police bus. He testified that the reason for the arrests was that they were blocking ingress and egress to the building in violation of state law.

Analysis and Conclusions

There is little dispute about what transpired in front of The News building on August 30 and as a result thereof. There was a rally in support of the then more than a year-old strike against the Respondents, which was attended by a crowd of what, at times, reached more than 300. At the order of the Detroit police, the front doors to the building were locked and barricaded so that no one could use them to enter or leave while the rally was in progress. At the end of the rally, by prearrangement with the police, a group of people, including several employees who were officials of the striking union locals, sat down on the front steps and stoop of the building for a brief period, refused police requests that they move, and were arrested.[109] Those arrested were taken to a police bus (without being handcuffed), driven to a gymnasium for processing (not a jail or police station), pled nolo contendere, and were released. Thereafter, the Respondents discharged every one of the arrested employees that they were able to identify for blocking ingress and egress to the building. There is no dispute as to the identity of the

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[109] The number arrested appears to have been dictated by the number of seats on the bus. In the videotape, as the bus is shown pulling away, there are still people sitting on the steps.

discharged employees or that each was present at the rally, sat down at the end, and was arrested.

There was no evidence that the rally organizers sought or were granted permission to use the Respondent's property. There is also none that any of the Respondents took any action to prevent or interfere with the rally. As was emphasized by their counsel throughout the hearing and in their briefs, the Respondents were the beneficiaries of a settlement agreement approved by the Board and an Order of the Sixth Circuit prohibiting the blocking of ingress or egress at their facilities. Although many, if not all, high-ranking security and/or labor relations official of the Respondents testified about the August 30 rally and/or its aftermath, not one indicated that any legal or other action was taken, or even considered, to see that the speakers or other demonstrators did not have access to the steps and stoop in front of The News building and/or that its front doors remained open that day. The reason is obvious. This was Labor Day weekend. There were numerous prominent national and local union, political, civic, and religious leaders participating in the rally, a large police presence, and no likelihood it would be violent or disruptive. It would have been a public relations disaster for them to have acted as the dog in the manger and prevented the rally from taking place, notwithstanding, their legal right to do so and the Sixth Circuit's enforcement Order in hand. When the Detroit Police directed that the doors be locked that morning, the Respondents did not object, claim that their business was being disrupted, or produce a copy of the Order. They locked and barricaded the doors. At that point, those attending the rally had done nothing that could reasonably be considered to have exceeded the bounds of peaceful and lawful conduct.

I find that the actions of the discharged employees in sitting down at the end of the rally did not constitute serious misconduct under *Clear Pine Mouldings*. The evidence is clear that the rally was not an attempt to block access to the building or disrupt production, unlike other instances of mass picketing, violence, and vandalism that undeniably had occurred during the strike.[110] It was a rally to drum up support for the strikers, not to interfere with the Respondents' business or its nonstriking employees. There were arrests to be sure but they were the idea of and arranged by the rally organizers to create a photo-opportunity to publicize their cause. The symbolic actions of those who sat down may have been technically illegal, as the Respondents assert, but so is parking overtime at a meter, and about as serious. The testimony of Lt. Noetzel makes it clear that those who were arrested that day had done nothing different than all of the others who stood on the steps or the stoop during the rally and that they were arrested for one reason only—because they asked to be:

> Q. (By Judge Scully) With respect to, I think you said the demonstrators were blocking ingress and egress at the time they stopped moving?
> A. Yes.

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[110] There were other doors through which persons desiring to enter and leave could do so that morning. There is no evidence that there were any picketers at those doors or of any effort to block them. There is uncontradicted evidence that union marshals were directed to keep the ramps open so that anyone desiring to enter or leave the building could do so, at least until the doors were locked. While the Respondents claim that, at some point, the ramps were blocked, it is a moot point inasmuch as the doors were locked and no one was disciplined for blocking the ramps.

Q. So, weren't there a lot of speeches and things? Weren't there a whole bunch of people standing around in front of the building while those speeches were going on?
A. Yes.
Q. Was there any reason why you didn't move at that point to require them to leave or be arrested?
A. We would be notified by the picket marshals and the picket captains ahead of time of the specific numbers of people to be arrested. They would inform us that they wanted these people arrested, this group, this number, et cetera.
Q. So it was all orchestrated ahead of time?
A. Oh, yes.
Q. Okay. So that's why you didn't make any move until the rally was essentially over?
A. Correct.

I also find that the Respondents' claims that these employees were discharged for allegedly blocking ingress and egress to the building and violating the Order of the Sixth Circuit are pretexts. In his testimony, Kelleher took pains to make it clear that he did not discharge anyone for attending the rally or demonstrating outside the building. These employees were discharged solely for blocking ingress and egress by sitting down on the steps and stoop. But, it is also clear that it was the rally and the crowd attending it that caused the police to direct that the doors to be locked, long before the sit-down began. Whatever disruption to the Respondents' business that occurred that day had been going on without objection by them for almost 2 hours before anyone sat down on the steps. As Lt. Noetzel testified, the blocking of ingress and egress began when the crowd in front of the entrance stopped moving and started listening to the speeches and it continued for about 2 hours before the sit-

down. I find that the Respondents used the fact that a number of local union officials and prominent strike supporters participated in the rally-ending sit-down and were the subjects of a prearranged photo-opportunity arrest to attempt to rid themselves of those employees by discharging them. There was no reasonable basis to conclude that those who sat down at the end of the rally were any more or less involved in blocking ingress and egress than anyone else in attendance at the rally, yet, they were the only ones singled out for disciplinary action. Moreover, there is no evidence that any of these employees prevented anyone from entering or leaving the building or that their sit-down could reasonably be said to have coerced or intimidated nonstriking employees. They briefly sat in front of a door that had been locked and barricaded for 2 hours and which the police would not let anyone go in or out.

Considering all of the circumstances, I find that these striking employees did not engage in serious misconduct by sitting down on the steps and stoop at the end of the rally and that the Respondents did not have a good faith belief that they had when it discharged them. Consequently, their discharges violated Section 8(a)(3) and (1) of the Act.

42. The Demonstrations at the Newspaper Bureaus

A number of striking employees were discharged for participating in demonstrations at bureaus of The News and The Free Press on October 16, 1996, and at a bureau of The Free Press on November 4, 1996. The bureaus which are independently operated by the two newspapers are located in suburban areas. They provide offices and facilities for the reporters and staff writers of the newspaper who work out of them. While they are open to the public to the extent that members of the public may use them to drop off

announcements and press releases or meet with reporters, there is no advertising or circulation business conducted at them.

Kelleher made the decision to discharge DNA employee James St. Louis for his participation in the October 16, 1996 incident at the Macomb County bureau of The News after reviewing certain documents. They were (1) an unsworn affidavit of Mark Puls, dated November 21, 1996, stating that he is a reporter for The News, that on October 16 a group including Kate Desmet and Mike McBride, whom he recognized as striking employees of The News, entered the bureau office, that Desmet twice pushed the hang up button on the phone he was using, that they said they wanted to talk about the strike, that they were carrying noisemakers which created a disturbance, that they surrounded him at his desk; that when the police arrived and asked them to leave, several, including Desmet, sat down on the floor and refused to leave for about 15 minutes, and that he identified Desmet, McBride, St. Louis, and Claudia Pearce from photographs as participants in the incident; (2) a copy of the photo identification card of James St. Louis; (3) an unsworn affidavit of Janet Naylor, dated November 12, 1996, stating that, on October 16 at about 2:30 p.m., 10 people entered the Macomb bureau office and identified themselves as striking newspaper employees and supporters, that during the approximately 25 minutes they were in the office they became disorderly by shaking soda cans filled with pebbles that made a loud noise, that when she returned to her desk, a man identified to her as St. Louis was seated in her chair and refused to get up, that as she attempted to use her phone to call the police, St. Louis hung it up and when she tried again another male protester hung it up, that after the police arrived, five of the protesters left but the other five sat down on the floor and refused to leave for several minutes, and that

she identified St. Louis and Desmet as among the protesters from photographs she was shown; and (4) an unsworn affidavit of Jeffery Savitskie, dated November 19, 1996, stating that on October 16 a group of protesters entered the Macomb bureau office and interrupted their work by chanting and using noisemakers that made it impossible for him to continue working or to hear callers on the phone, that he saw one of the protesters hang up a phone that a reporter was using; that after police arrived about five of the protesters continued to refuse to leave, that they were in the office for a total of about 30 minutes, and that he was able to identify only St. Louis from photographs he was shown. Based on the information in the foregoing, Kelleher concluded that St. Louis and others had entered the bureau office using noisemakers to disrupt its operations, that St. Louis had sat at one of the desks of a staff member and refused to get up when asked to do so, and that this constituted misconduct for which he should be terminated.

Giles made the decisions to discharge News employees Desmet and McBride for their involvement in the October 16 incident at the Macomb bureau after reviewing the above-mentioned affidavits of Puls, Naylor, and Savitskie, a videotaped statement by Puls, and a newspaper article about the incident. He testified that he concluded that they had entered the bureau, disrupted the work activity and intimidated employees by shouting and using noisemakers and by preventing them from calling for help.

Giles made the decisions to discharge News employees Robert Ourlian and Allan Lengel for their participation in the October 16, 1996 incident at the Oakland County bureau of The News after reviewing certain documents. They were (1) a statement by Jane Daugherty, dated October 16, 1996, that at about 2:40 p.m. on October 16 two elderly women knocked

on the door of the Oakland bureau with a press release, that the door had been locked because they had learned of the demonstrations at other bureaus that day, that Bureau Chief Doug Durfee slammed the door in their faces after taking the release, that about 6 others joined them in the hallway outside the door, shaking noisemakers, kicking and pounding on the door, howling, and shouting insults, that when the police arrived Ourlian entered the office to talk with them and was told they had to leave or they would be issued $ 100 tickets, that among the picketers was Daymon Hartley who photographed News employees through a glass panel next to the door and Allan Lengel; (2) a sworn affidavit of Judy DeHaven, dated October 18, 1996, stating that two elderly women knocked on the door at about 2:35 p.m. on October 16, that Durfee unlocked the door took a flyer from them and relocked the door, that the group of seven or eight gathered outside the office began banging and scratching on the door, shaking noisemakers and shouting at those inside, that one of the group took photographs of those inside the office, that Lengel put his mouth to the mail slot and began howling through it, that after 5 to 10 minutes the police arrived and brought Ourlian, who described himself as the group's spokesperson, into the office, and that the group assembled in the hallway blocked the only door to the bureau; and (3) a sworn affidavit of Douglas Durfee, dated October 17, 1996, stating almost word for word the same as the affidavit of DeHaven. Giles testified that based on the foregoing and a newspaper article about the incidents he concluded that Ourlian and Lengel and others came to the bureau intending to trespass and harass the employees there, that after being unable to enter they pounded and scratched on the door, made loud noises which intimidated and coerced those inside who felt trapped and frightened and thought that the strikers wanted to break in and harass them.

Giles also made the decision to discharge News employee Claudia Pearce for her participation in the October 16, 1996 incident at the Macomb County bureau of The Free Press after reviewing certain documents. They were (1) a sworn affidavit of Victor Galvan, dated October 18, 1996, stating that he is the Bureau Chief of The Free Press Macomb bureau, that on October 16, at about 2:30 p.m., a group of about eight people walked into the bureau, that two men took off jackets and he saw that one was wearing a union T-shirt, that Galvan told all employees to log off their computers and leave the bureau, that the strikers were carrying noisemakers and making so much noise it was impossible to hear or transact business, that he recognized one of the group as Emily Everett, a striking Free Press employee, that after the police arrived they several times asked the strikers to leave or be arrested for trespassing, that they refused to leave and, after 10 minutes, six or eight were arrested, that at the time of the arrests the strikers had been in the bureau about 40 minutes, and that the strikers videotaped and photographed what was taking place; and (2) a Mount Clemens Police Department report, dated October 16, 1996, stating that officers responded to a report of a group of strikers taking over The Free Press office, that the office manager reported that eight people entered the office, shaking noisemakers, disrupting operations and refused his request that they leave, that the police entered the office and found eight persons inside, that Claudia Pearce identified herself as the spokesperson and said that they were staging a protest and were taking over the office now that the scabs had left, that she was advised that they should leave or face arrest, that once additional police officers arrived they and the manager asked the people to leave and all but one refused, that those remaining were arrested and issued tickets for trespassing. Based on the foregoing and a newspaper article about the incidents, Giles concluded that Pearce had violated the NLRB

settlement agreement and the Sixth Circuit Order by trespassing and taking over company property as well as intimidating and harassing employees and that she should be discharged.

Meriwether made the decision to discharge Free Press employees Daymon Hartley, George Waldman, and Emily Everett for their participation in the demonstrations at the bureau offices on October 16 and to discharge Everett again for participating in the November 4 demonstration. He testified that he was given reports about The Free Press bureaus being invaded at the time the incidents occurred. He said that he discharged Hartley, Waldman, and Everett based on the recommendations of Taylor after consulting with Robert McGruder the executive editor of The Free Press. He had also reviewed a memorandum dated October 16, 1996, from McGruder and Carole Hutton, managing editor of The Free Press, to DNA Director of Security John Anthony, summarizing what had happened. The memo states that about 10 picketers, including Emily Everett, had entered the office shaking noise makers and making it impossible to hear, that Galvan ordered the staff to leave the office, that the police arrived asked the picketers to leave, and that six to eight who refused were arrested. He also reviewed a memo, dated, November 4, 1996, from Hutton to Anthony, stating that on that date eight or nine strikers, including Everett, entered The Free Press' Oakland Bureau and dropped off leaflets and copies of The Sunday Journal, that a striking mailer and his wife told a staff member Becky Beach, whose child attended the same school as theirs, that she was not well thought of and was being talked about at the school, that the police were called but before they arrived the strikers gathered around Beach's desk and chanted "Shame" at her and walked out, that they continued to protest outside until after the police had come and left, that after the police left the strikers reentered

the building, remained in the hallway using noisemakers, shouting and banging on the door, that the building manager asked them to leave but they refused, and that after the police were called a second time, the strikers left just before they arrived. Taylor testified that he made his recommendations to Meriwether after reviewing various documents concerning these incidents. They were (1) the October 18, 1996 affidavits of Galvan, DeHaven, and Durfee and the October 16, 1996 statement of Daugherty; (2) a sworn affidavit of Rebecca Beach, dated November 8, 1996, describing the incident; and (3) the November 4, 1996 memo from Hutton to Anthony.

Analysis and Conclusions

I find that, in each case, the Respondents have established that the officials of who made the decisions to discharge the employees involved in the demonstrations at the bureau offices on October 16 and November 4, 1996, had a good-faith belief that those discharged had participated in the demonstrations and that their actions constituted serious misconduct. The affidavits and reports about the incidents indicated that a group of demonstrators entered or attempted to enter the bureau offices uninvited and refused to leave after being asked to by office personnel and/or the police. They also indicated that the bureaus' normal business operations were disrupted by shaking noisemakers, shouting, and by the demonstrators' sitting at the staff members' desks or on the floor and hanging up their telephones. In each instance the police had to be called and in one case some of the demonstrators were arrested. There was nothing to indicate that any of the demonstrations had any purpose other than to interfere with the operations and intimidate the employees working at the various bureaus.

I also find that the General Counsel has not established that this disruptive activity did not occur, that those discharged were not correctly identified, or that their activity did not constitute serious misconduct under *Clear Pine Mouldings*. Most of the bureau staff members whose affidavits were relied on by the Respondents in making its discharge decisions, including Puls, Naylor, DeHaven, Durfee, Daugherty Galvan, and Beach appeared as witnesses at the hearing, as did police Lieutenant Charles Peace who was involved in the arrests at the Macomb bureau of The Free Press. They all gave credible testimony and in no case was there any significant variation between their prior affidavit, statement, or report and their testimony. Other witnesses who were present during the demonstrations but had not given statements that the Respondent relied on in making their discharge decisions, such as Laura Berman and Kim North, gave credible and consistent corroborating testimony. I credit that testimony over the self-serving claims of the General Counsel's witnesses to the effect that they were invited into the bureau offices, that they were not noisy or disruptive but merely sought to engage the employees in the offices in conversation, and that they were not asked or told to leave the offices.

Counsel for the General Counsel argue that long-time employees of the Respondents were discharged "because they entered a Bureau office and spoke to the employees working there for 15-20 minutes" and that the discharges involved "a trivial matter." The evidence shows that, on October 16, there was a coordinated effort to disrupt the operations of several bureau offices by entering the offices (or where the doors were locked standing outside), shaking noisemakers, shouting, sitting-in, and otherwise making normal work activity difficult or impossible. The same type of activity occurred on a smaller scale on November 4. It is difficult to imagine any

purpose for shaking noisemakers, banging on doors, chanting, or howling through a mail slot, other than to disrupt the business being carried inside the office. Similarly, invading an office, sitting at an employee's desk, refusing to leave when asked, and hanging up the telephone an employee is attempting to use, appear to have no purpose other than disruption and harassment. Two of the discharged employees, Desmet and Everett, called as witnesses by the General Counsel, admitted that the purpose of the demonstrations was to disrupt the business of the offices and to make the employees working there feel uncomfortable. The evidence also shows that they were successful. I find no merit in the suggestion that because these bureau offices and/or the buildings in which they were located were open to the public, that the demonstrators could walk in and disrupt their business operations with impunity. I also reject, as specious, the argument that because some of the employees in the offices may have engaged in conversations with the demonstrators or may have found some of their antics, such as Lengel's howling, momentarily amusing, the disruptions were trivial or that there was no grounds for discharging them. Applying an objective standard, I find the demonstrations were disruptive and coercive and constituted serious misconduct.

I also find that the General Counsel has not established that any of those who were discharged did not actively participate in the disruptive conduct of the demonstrators. It is argued that there is no evidence that Waldman did anything but sit on the floor outside the door of the bureau office, that McBride did not use a noisemaker but only talked to people about the strike, and that Hartley did not photograph

employees in the bureau office.[111] These are not cases in which the employers have sought to rely on general allegations of misconduct to support their discharge decisions. E.g., *General Telephone Co.*, supra. Here, the reasons for the discharges were the Respondents' good-faith beliefs that the discharged employees had participated in the specific group activities that caused the disruptions at the bureau offices. Under these circumstances, where the purpose of the demonstrations was to disrupt the bureaus' operations and there is no doubt but that they were actively cooperating with the groups' efforts, they are equally culpable regardless of the degree of participation. *GSM, Inc.*, supra. I find that the General Counsel has not established that any of these discharges violated the Act.

43. Discharges of Gordon Adams, Delford Earnest, Walter Macelt, and Dennis Romanowski

On November 22, 1996, about 3 p.m., DNA employees, Gordon Adams, Delford Earnest, Walter Macelt, and Dennis Romanowski established a picket line at the railroad tracks leading into the Riverfront Plant.[112] All of the pickets were sent letters, dated January 31, 1997, informing them that they were being discharged by the Respondent for blocking the ingress of a Norfolk and Southern Railroad (N&S) switch engine as it attempted to enter the Riverfront property on November 22, 1996.

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[111] I do not credit Hartley's denial. There was ample credible evidence that he used the camera that he admits he with him.

[112] Another individual, Michael English, was a part of this group but he is not named as an alleged discriminatee in this consolidated matter.

Romanowski testified that when the pickets arrived they began patrolling in an area between the gate to the Riverfront Plant and a gate he believed enclosed the property of N&S. That area is separated from the street by three concrete barriers which would prevent a vehicle from entering, but not pedestrians, and is not fenced. He has seen people using this area to gain access to a walkway on the Detroit River side to run and to fish. There was an engine on the track inside the N&S property gate and an individual, who indicated he was the engineer, began to unlock that gate. The engineer asked what they were doing and, when they told him they were establishing a picket line, he said that he would honor it but that he would have to inform his supervisor. After about 20 minutes, two individuals arrived who said they were superintendents from N&S and that the pickets were trespassing on railroad property. One of the pickets asked them for identification but they said they did not have to provide any and that the pickets should get off the property. They continued to picket and about 5 minutes later two individuals arrived who identified themselves as railroad detectives. The detectives showed their identification and requested that the pickets break the picket line, which they did. The engineer got out of the engine and one of the persons, who had said he was a superintendent, got in and drove it forward to the gate of the Riverfront Plant, which was still locked. After that gate was unlocked, the engine pulled in and later exited pulling freight cars. No criminal charges were brought against Romanowski as a result of this incident.

Kelleher testified that he made the decision to discharge these employees after reviewing a videotape of the incident and certain documents. The documents were (1) copies of the photo identification cards of Adams, Earnest, Macelt, and Romanowski, (2) an APT-DNA incident report, by security

guard Kevin West, stating that he observed and documented, on videotape, union supporters engaged in mass picketing and blocking an incoming train, at the Riverfront Plant on November 22, 1996; (3) an unsworn affidavit of Kevin West, dated December 18, 1996, stating that he was shown a video of the November 22 incident at the Riverfront Plant, purporting to describe what the video shows, and stating that Adams, Earnest and Romanowski made derogatory statements to him; (4) an unsworn affidavit of Jay Kaufmann, dated December 4, 1996, stating that he was shown a video of the November 22 incident at the Riverfront Plant and that he identified Romanowski, Macelt, Earnest, and Adams whom he knows from having worked with them for about 7 years; (5) an unsworn affidavit of Paul Selchau-Mark, dated December 18, 1996, identifying persons in the video as Romanowski, Macelt, and Earnest; (6) an unsworn affidavit of Anthony Buhagiar, dated December 4, 1996, identifying persons in the video as Romanowski, Macelt, Adams, and Earnest, with whom he has worked for 13 years; (7) an unsworn affidavit of Joe Green, dated December 4, 1996, identifying persons in the video as Romanowski, Macelt, Adams, and Earnest, with whom he has worked for over 14 years; and (8) an unsworn affidavit of Dennis Schutter, dated December 4, 1996, identifying a person in the video as Macelt, with whom he has worked for a few years. Based on the information in these materials, Kelleher concluded that the picketers attempted to and did impede an N&S train from entering DNA property to switch rail cars used to deliver newsprint, that this activity violated the Board's settlement agreement and the Sixth Circuit's Order; and that they should be terminated.

Analysis and Conclusions

Kelleher's testimony and the discharge letters issued to the employees indicate that they were discharged for blocking ingress of the engine to the Riverfront facility, thereby, delaying the normal switching operation. I find that this is the only basis on which the Respondent purported to rely when it discharged them and is the only basis on which the lawfulness of the discharges should be considered, notwithstanding, the contentions in the Respondents' brief that there were other reasons. See *Champ Corp.*, 291 NLRB 803, 806 (1988).

The Respondent apparently now contends that, in addition to blocking the engine's ingress, the alleged misconduct for which the employees were discharged also included "trespassing and coercively intimidating a worker through threatening and racial remarks and interfering with the worker's Section 7 right to work during a strike." The Respondent attempts to use unsworn hearsay material, admitted solely for the purpose of establishing its good-faith belief that misconduct occurred, as substantive evidence of that misconduct. The only reference to any alleged threats or a purportedly racial remark by the picketers in the record is in the unsworn affidavit of a Kevin West, one of the documents Kelleher reviewed. This so-called "affidavit" fails to establish West's race or that comments allegedly directed towards him had a "racial" connotation. No such comments were mentioned in the report he prepared on the day of the incident and none are recorded on the videotape of the incident in the record. Like the other "affidavits" Kelleher reviewed in connection with this incident (in which persons who were not present apparently were shown a videotape in order to identify the picketers but in which they purport to describe what allegedly occurred), West appears to give a narration of what he saw on the videotape he was shown.

While he also states that certain remarks were made to him by the picketers, there is no evidence that the discharge of any of these employees was based on a belief that he had made threats or racial remarks to West or that anyone interfered with West's right to work. Moreover, West was not called as a witness and there is no probative evidence in the record that any such remarks were in fact made.

There is also no evidence that the picketers were guilty of trespassing or that Kelleher based his decision to terminate them on a belief that they were. The videotape shows that they were picketing in a small area between the street and the river that is not fenced off or posted, unlike the properties belonging to the DNA and N&S on either side. The uncontradicted testimony of Romanowski was that the public uses the area to gain access to the walkway adjacent to the river where people jog and fish. Indeed, it is reasonable to assume that the area was left unfenced for that purpose. Although once the railroad detectives arrived, they asked the picketers to move aside to let the engine pass, they did not arrest them or order them out of the area. As shown in the video, when the switch engine later left the DNA property pulling the freight cars, the picketers were still standing in the area next to the tracks. I find there is no evidence establishing that their presence in this area constituted trespassing. As is discussed above, the fact that the Respondent claims their actions violated the settlement agreement enforced by an Order of the Sixth Circuit adds nothing and provides it with no basis for taking disciplinary action against them.[113]

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[113] There is no evidence that the Respondent took any action to have these employees or their unions held in contempt for violating the Sixth Circuit Order.

I find that the Respondent has failed to establish that it had a good-faith belief that the employees who were picketing on the N&S railroad tracks had engaged in serious misconduct under the standards of *Clear Pine Mouldings*. The only evidence underlying the Respondent's belief that the picketers blocked of the N&S switch engine from entering the DNA's plant is what is shown on the videotape. It clearly contradicts West's claim that there was "mass picketing," as there were a total of five pickets patrolling in the area between the gates. After viewing the videotape, I find that there was no reasonable basis on which Kelleher could have concluded that the pickets had blocked the switch engine's ingress to the plant.

The Respondent contends that the engine stopped because the pickets would not get off the tracks and allow it to enter the DNA's property. The uncontradicted and credited testimony of Romanowski, the only witness to testify at the hearing who was present at the scene, establishes that when the pickets arrived in the area, the engine was stopped on the N&S property and that, once the engineer was informed that they were setting up a picket line, he told them he would honor it, but he would have to inform his supervisor. The Respondent argues that this latter comment establishes that the engineer did not voluntarily honor the picket line. It also claims that the engineer did not drive the train forward because he was concerned about the pickets' safety. There is nothing in the record to establish this. The engineer did not testify and there is no evidence to contradict Romanowski's testimony that he said he would honor the picket line. That statement was unambiguous and it is clear from the testimony of Romanowski and the video that the engineer was not the person who eventually drove the engine into the Riverfront facility. This is what a lawful picket line is intended to do, to appeal to others not to cross it. The fact that the engineer

refused to cross the picket line does not establish that the pickets unlawfully blocked ingress to the facility or render them guilty of misconduct.

The Respondent also argues that because the pickets continued to patrol in the area for about 5 minutes between the time that the two persons, who said they were N&S superintendents, arrived at the scene and began talking to the pickets and the time the railroad detectives arrived, this blocked the engine and warranted their discharge. I do not agree. There is no reason to believe that such a brief delay was coercive or intimidating to anyone. The purported superintendents did not testify and there is nothing to establish who they were, what authority, if any, they had to order the pickets out of the area, or what exactly transpired between them and the pickets. But apart from that, there is no evidence that any attempt was made to move the engine or that there was even anyone in the engine prepared to operate it while they were talking with the pickets and none that the pickets blocked it or impeded its progress. Even after the pickets stepped away from the tracks at the request of the railroad detectives, the engine did not move for another 2 minutes. I find that the evidence fails to establish that the picketers physically blocked the switch engine from proceeding at any time during this incident. The delay in the switching of the rail cars that resulted from the engineer's honoring the picket line was the consequence of lawful conduct. Accordingly, the discharges based on this incident violated Section 8(a)(3) and (1).

44. Discharges Resulting from Demonstration at the Riverfront Plant on December 30, 1996

On December 30, 1996, a demonstration took place in front of the DNA's Riverfront plant in Detroit. As a result,

the DNA discharged employees Mildred Kenyon, Eugene Nawrot, Charles Porter, Reuben Ramirez, Ann Marie Znamer, and Robert Zvonek; The News discharged employees Kathleen Desmet, Allan Lengel, and Claudia Pearce; and The Free Press discharged employees Nancy Dunn and Daymon Hartley. Letters issued to these employees stated that they were being discharged for blocking the ingress and egress of traffic at the Riverfront plant on that date.

The videotapes of the incident and the testimony of several participants and the police officers who were present establish that a group of striking employees and others, numbering from about 250 to 400, demonstrated in the middle of Jefferson Avenue near the main entrance to the Riverfront facility from about 4 to 6:30 p.m. The demonstrators stood and at times sat down in the street and stretched a large banner, reading "No Justice No Peace," completely across it. The street, which is a main city thoroughfare, was blocked throughout that period and no vehicular traffic could use it. As a result, no vehicles could enter or leave the main entrance to the Riverfront facility while the demonstration was going on. After the ranking Detroit Police official, Commander Herman Curry, arrived on the scene at about 5 p.m., he ordered traffic diverted off of Jefferson so that none of those in the street would be struck by a vehicle. However, well prior to that point, the street was impassable. At about 6:30 p.m., Curry requested that the demonstrators who were sitting in the street return to the sidewalk. After he repeatedly advised them that they were violating the city's disorderly conduct law and they continued to refuse to move, they were arrested. The charges against those arrested were subsequently dismissed. The Respondents obtained a copy of the list of persons arrested for sitting down in the street and each discharged all of their employees who were on that list.

Kelleher testified that he made the decisions to discharge the DNA employees after reviewing videotapes of the incident, news broadcasts by television stations covering the incident which included a statement by Nancy Dunn, and the police log on which were recorded the names of those persons he was advised were arrested for being involved in the blocking of ingress and egress to DNA property. He testified that he knew that the main gate on Jefferson Avenue had been blocked by the demonstrators and that DNA vehicles had been unable to get in and out of the facility for a couple of hours. He could not tell from the videotapes who had engaged in actually blocking or denying ingress to the facility and relied on the list of persons arrested by the police to determine who was involved.

Giles testified that he made the decisions to discharge News employees, Desmet and Lengel after reviewing videotapes and the police log naming those arrested and considering Taylor's recommendation that The News employees involved in the demonstration be discharged. He concluded that Desmet and Lengel had participated in the demonstration which blocked ingress and egress to the main entrance to the Riverfront plant in violation of the settlement agreement and the Sixth Circuit Order. Silverman testified that he made the decision to discharge Pearce after he succeeded Giles and it was discovered that Pearce was on the list of those arrested. He did so after reviewing the videotapes, the police log showing that she was arrested in connection with the incident, the NLRB settlement agreement and the Sixth Circuit Order. He concluded that she was engaged in blocking ingress and egress to the main entrance to the Riverfront plant in violation of the settlement agreement and Order.

Meriwether testified that he made the decisions to discharge Free Press employees Dunn and Hartley based on the recommendations of Taylor, whom he said had reviewed the evidence and recommended that they be discharged. Taylor told him that Dunn and Hartley were blocking the entrance to the Riverfront plant, but he did not recall specifically what he said. Taylor testified that he first saw reports of the incident on the television news at 11 p.m., which showed the banner stretched across the street and an interview with Dunn. He also reviewed videotapes of the incident and the police document showing the names all of the people who had been arrested for sitting down and blocking. He recommended to Meriwether that Dunn and Hartley be discharged for their participation in the incident.

Analysis and Conclusions

Counsel for the General Counsel and the Unions contend that the Respondents' reliance on the fact that these individuals had been arrested at the scene of the demonstration at the Riverfront facility on December 30 is insufficient to support a good-faith belief that any one of them engaged in serious misconduct. They argue that absent knowledge of the specific details of the individuals' actions that evening, the requirements of *General Telephone Co.*, supra at 739, that there be "some specificity in the record, linking particular employees to particular allegations of misconduct," have not been met. I do not agree and find that each of the Respondents has established that it had a good-faith belief that those of its employees who were discharged in connection with this incident had actively participated in the demonstration, which had closed down the street in front of the facility, thereby, making it impossible for vehicular traffic to enter or leave using the main gate. There can be little dispute but that the mass demonstration by several

hundred persons standing and/or sitting in the street made it impassable and effectively blocked ingress and egress to and from the plant. Unlike the situation in *General Telephone*, where the misconduct involved "general violence and destructive activity," here, the alleged misconduct was the mass demonstration that blocked the street for over 2 hours and prevented any vehicles from entering or leaving the main gate to the facility. The Respondents, through Taylor, had been informed that those arrested were sitting in the street in defiance of police orders to move. Those arrested were not people who happened to be in the area or who stood and/or patrolled on the sidewalk at all times during the demonstration. They all were specifically identified as having sat down in the street and refused to move.

I also find that the General Counsel has not established that any of those who were discharged did not sit down in the street that evening or that their participation in the demonstration did not constitute serious misconduct.[114] Desmet, who was involved in planning the demonstration, testified that it was meant to coincide with the 60th anniversary of the Flint sit-down strike by the UAW and was a nice tie-in to increase public awareness of the newspaper strike. She also testified that she felt getting arrested would generate publicity about the strike. When she arrived at the demonstration, she spoke with others about all sitting down at one time and informed the police that they would be doing so. She said that people had been sitting in the street off and on

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[114] The only person who disputes being among those who were arrested for sitting down in the street as a part of the demonstration is Daymon Hartley. I find that his testimony, that he was there as a professional photographer, as well as to support the strike, fails to establish he was not a participant in the illegal demonstration or that he was unlawfully discharged.

from 4:30 to 6:30 p.m.[115] About 33 of them were sitting in the street to the side of the main entrance to the plant went the arrests were made. She said that she had picketed at the Riverfront plant before and was aware that trucks used the main gate to go in and out. She also said that none were able to enter and leave through that gate between 4:30 and 6:30 that evening. The avowed purpose of the demonstration, which the demonstrators succeeded in achieving, was to get media coverage by illegally blocking Jefferson Avenue. By doing so, they also prevented any vehicles from entering and leaving through the main gate of the plant. I find this intentional blocking of ingress and egress constituted serious misconduct and was grounds for discharge.[116] The fact that the Respondents were able to identify and discharge only about 30 of the hundreds who participated in this illegal activity does not in any way lessen their culpability. They had

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[115] Lengel also testified to sitting down in the street during the demonstration for about an hour and a half.

[116] I find the fact that the purpose of the demonstration was to block the entrance to the Riverfront plant and that those who sat down in the street did so to further that objective distinguishes these discharges from those arising from the incidents on August 29 and 30, 1996. In connection with the August 29 Hayes Distribution Center incident, I found that the picketers who were discharged for patrolling in front of the facility did not block the entrance or prevent anyone's ingress or egress. Those discharged for sitting down in front of the entrance to The News building on August 30 did not do so until long after the entrance had been closed and barricaded. The Respondents expressly disavowed taking disciplinary action against anyone for attending the rally that preceded the ceremonial sit-down and photo-op arrests. However, it was the rally not the sit-down that led to the entrance being closed.

actively cooperated in the activity which blocked traffic in and out of the facility. *GSM, Inc.*, supra at 175. I find that the General Counsel has not proved that these discharges violated the Act I shall recommend that these allegations be dismissed.

F. Disparate Treatment

As discussed above, an employer cannot use a double standard to punish strike misconduct while at the same time failing to take the same disciplinary action against a nonstriker who engages in misconduct that is at least as serious. The General Counsel has the burden of establishing such disparate treatment by a preponderance of the evidence. Here, counsel for the General Counsel introduced a substantial amount of evidence concerning disciplinary actions against nonstrikers which they contend establishes disparate treatment. For the most part, this consisted of little more than a written record of the disciplinary action taken against a particular employee. I find that most of this evidence fails to prove disparate treatment because it does not establish that (1) the misconduct had any relation to the strike; (2) while unrelated to the strike, the misconduct was so similar to that for which a striker was disciplined that there was no reasonable, nondiscriminatory basis for treating it differently; and/or (3) while related to the strike, it was sufficiently similar to the misconduct for which any striker was disciplined. The only two incidents which I have found to constitute disparate treatment are as follow.

1. Incident Involving Susan Stark

Susan Stark has been employed by The News since 1971 as a movie critic and reporter. She did not work during the first few days of the strike but returned within a week. On the evening of December 22, 1996, Stark and her daughter attended a Christmas party at the home of The News publisher

Robert Giles. That evening, a group of strikers, including Rebecca Cook, were picketing outside Giles' home. As Stark was leaving the party, she encountered Cook who was taking photographs with her camera. Stark gave Cook the finger and told her to "take my picture." Stark then approached Cook and pushed the camera she was holding in front of her face. Cook claims that the camera struck her in the face. Stark denies this. As a result of this incident, both Kelleher and Taylor determined that Stark had engaged in serious misconduct and recommended that she be terminated. Giles, who made the final determination for The News concerning strike-related misconduct, reduced the disciplinary action against Stark to a written warning. He did so after talking with her about it, reviewing a videotape of the incident, and learning that no action would be taken on the criminal complaint Cook had filed against Stark.

Giles testified that prior to this incident, on more than one occasion, Stark had complained to him about being harassed by unidentified persons while crossing picket lines at work. She similarly complained that she was subjected to verbal abuse while entering and leaving his home on the night of this incident. In making his decision to discipline her less severely than had been recommended, he took into consideration the fact that Stark and other guests were upset by the picketers' verbal abuse and Cook's "coercive" photography. He said that the fact that the picketers were on his posted private property and were violating the Sixth Circuit's Order also influenced his decision.

Analysis and Conclusions

Considering all of the evidence concerning the events of that evening, there is nothing to establish that anything Cook or the other picketers did or said that night was so

provocative, outrageous, or coercive as to excuse Stark's behavior. Moreover, the videotape shows Stark repeatedly responding to the picketers in kind. Although Giles testified that that the street in front of his home was posted, implying that the picketers were trespassing, they were there for several hours. There were both private security guards and Grosse Pointe Farms police officers present throughout the evening, but no effort was made to prohibit the picketers from standing in front of the house or to remove them, nor was anyone was disciplined for trespassing. Insofar as the Respondent may now contend that the picketing or Cook's taking photographs that night violated the Sixth Circuit Order, there is no evidence that it took any disciplinary action against anyone as a result of the incident or that it sought to have her or any of the picketers prosecuted for violating the Order. Moreover, Stark's assault on Cook came after she deliberately approached Cook and asked her to "take my picture," while giving Cook the finger. It was immediately after Cook told her she would not because Stark was "too ugly" and would break the camera that Stark struck her. The videotape shows that, if anything, Stark was the aggressor in the incident, mocking Cook after she shouted for the police, and offering to strike her again.

Giles' testimony about his decision to discipline Stark establishes that he applied a different standard to her than he applied to striking employees accused of picket line or other misconduct related to the strike. Stark not only violated the Respondent's policy prohibiting employees from confronting and/or interacting with picketers by more than once approaching Cook and engaging in verbal exchanges with her, but she assaulted Cook by pushing her camera into her face. The two persons who had the most experience and direct involvement in dealing with strike-related misconduct on behalf of the Respondents, Kelleher and Taylor, both

concluded that Stark's actions in assaulting Cook warranted discharge. There is nothing in the record to indicate that when Giles made his decision to overrule their recommendations he had any evidence that was not available to them other than Stark's explanation that she was upset and provoked by verbal abuse from picketing employees on several occasions during the strike and when she entered and left Giles' house that evening. Based on this, he excused Stark's misconduct and issued her only a written warning. In essence, Giles applied a balancing test in which Stark's misconduct was weighed against her subjective determination that she had been provoked and he concluded the provocation justified her violent reaction. This is just the sort of balancing test that the Board discussed in *Clear Pine Mouldings*, where it rejected "the notion that striking employees are free to engage in or escalate violence or misconduct in proportion to their individual estimates of the degree of seriousness of an employer's unfair labor practices," 268 NLRB at 1047, and determined that misconduct by strikers should be judged according to an objective standard. A similar standard should apply to the actions of nonstrikers.

Considering all of the circumstances, I find that by failing to discharge Stark the News violated the Act by applying a double standard and tolerating behavior that was at least as serious, if not more so, than that on which it relied on in the cases of the other striking employees that it terminated. E.g., *Chesapeake Plywood*, supra at 204; *Aztec Bus Lines*, supra. There is no question but that Stark's assault on Cook constituted serious misconduct warranting termination when compared with the actions of many of those employees and the zero tolerance standard the Respondent applied to them. See *Aztec Bus* Lines, supra at 1028 fn. 20. Its own agents, Kelleher and Taylor, had so determined and recommended that she be discharged. None of the circumstances Giles

considered in making his decision to impose a lesser penalty changes that.

The remaining question is who should be affected by the exoneration of Stark by The News. Counsel for the General Counsel argues that disparate treatment by one Respondent should apply to the employees of all three. The evidence shows that the disciplinary policies applied to strikers by the three Respondents were essentially the same, that they had an integrated system for reporting and investigating reports of misconduct, that they shared information, and, most important, that the same person, Taylor, was involved in and the moving force behind every discharge involved here. On the other hand, the evidence also shows that the Stark case was an aberration. It involved a single instance in which Giles apparently let his friendship and long professional relationship with Stark influence his decision. He overrode the established disciplinary policy and let Stark off with a warning when she should have been discharged. It appears that he had the power to do so only in the case of employees of The News. I do not believe the interests of justice or the policies of the Act would be served by extending the effects of this one instance of disparate treatment beyond the employees of The News. I also do not believe this one isolated incident should be applied to exonerate employees of The News who engaged in repeated acts of serious misconduct. Consequently, I find that the only striking employees of The News whose discharges should be held to be unlawful on the basis of the disparate treatment accorded Stark are Rebecca Cook, Marcus Franklin, Francis Hopkins and Scott Martelle.[117] Cook's action in kicking a

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[117] I have previously found that the discharge of Martelle for his participation in the sit-down in front of The News building after the rally on August 30, 1996, was unlawful.

security guard in the shin in reaction to her belief that he had struck her in the back was similar to and no more violent or injurious than Stark's actions in pushing the camera into her face. Similarly, Hopkins was discharged for pushing a non-striking employee in the back after a verbal exchange.[118] Franklin's verbal threats to an editor did not involve any actual violence.[119]

2. Incidents Involving Inina Jones and Stephanie Williams

During the strike, an APT security guard staked out a newspaper rack in Garden City from which newspapers had frequently been stolen. The guard filed an incident report stating that he had observed and videotaped 2 people stealing 15 to 20 newspapers out of a rack on February 2, 1996, and indicating the license number of the vehicle. On March 3, 1996, DNA investigator Jesse Bartlett filed a report stating that he had observed and filmed a person taking all of the newspapers out of a rack in Garden City on that date. After tracing the license number of the vehicle involved, it was learned that the perpetrator in both instances was Inina Jones, a home delivery employee of the DNA. Jones was confronted about these thefts by Supervisor Jeff Gibson and she told him that she had taken newspapers from the rack because she had run short of papers for her route customers. She said she had done it once before and did not know it was wrong. Gibson

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[118] Although Hopkins was suspended for verbally abusing persons outside The News building, the pushing incident was the single incident of serious misconduct in which he engaged.

[119] I have found that all of the other striking employees of The News whose discharges are being litigated in this matter engaged in two or more acts of serious misconduct.

told her that this was considered stealing and that if it happened again she would be terminated immediately.

Also during the strike, it was reported to DNA Supervisor Andrea Ferraris that, on October 18, 1996, Stephanie Williams, a district supervisor who was in the process of training a new carrier, was caught taking 7 newspapers from a rack in Brighton without paying for them. Ferraris suspended Williams for 3 days for this offense and informed her that another violation could result in termination. Williams had previously signed a policy statement informing her that taking newspapers out of racks to make up shortages was prohibited and she admitted to Ferraris that she knew it was wrong to take newspapers from a rack.

Analysis and Conclusions

There is no real dispute about what happened in either instance. In one case, a carrier, and, in the other, a supervisor training a carrier, ran short of newspapers needed to complete home delivery routes. Instead of returning to the distribution center for more or buying them from a store and submitting a receipt, as DNA policy required, they put the price of one newspaper (35 cents) in a rack to open it and stole the balance of what they needed.

In its brief, the Respondent argues that this does not constitute theft because the home subscribers to whom the stolen newspapers were delivered had already paid for their newspapers. At the hearing, it was even suggested that, because of this fact, the DNA actually came out 35 cents

ahead on each theft. Both arguments are unpersuasive.[120] I find no reason to doubt that, when Gibson told Jones her actions were considered to be stealing, he meant it. I also find unpersuasive its argument that the stealing of newspapers by Jones and Williams somehow differs from what strikers Ryan and Perkins were discharged for, discussed above. Because the Respondent *thought* that Ryan and Perkins had taken newspapers without paying for them, in other words, had *stolen* them, it discharged them. Although it *knew* that Jones on at least two occasions and Williams on one occasion had *stolen* newspapers, it gave Jones a warning and gave Williams, a supervisor who was training a carrier at the time, a 3-day suspension.

I find this constitutes evidence of disparate treatment and that none of the Respondent's attempts to explain away the disparity has merit. First, it contends the conduct was not comparable and that of Ryan and Perkins was more serious. The evidence establishes that each incident involved what the Respondent regarded as a theft of newspapers. As Gibson pointed out to Jones, a theft of this kind is a terminable offense. Next, it contends that there is no evidence that Jones and Williams were treated more leniently because they were not strikers. I find that the General Counsel need only show that the disciplined strikers were treated in a disparate manner, not that the nonstriking employees were treated more leniently because they were not on strike. Finally, it contends that the fact that the disciplinary actions were taken by

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[120] If on a given day, a rack with 20 newspapers in it produces a total of 35 cents in revenue, by my calculations, the DNA is potentially out up to $6.65, for the 19 newspapers that were not paid for by rack purchasers, regardless of whether the home subscribers have paid for their newspapers or not.

different decision-makers excuses the disparity. I find that, in this instance, it makes no difference. The evidence shows that in Jones' case her thefts were suspected to be strike-related, as the stake-outs were conducted by APT personnel and by an investigator named Bartlett, who were retained to deal with strike misconduct. However, once it learned the perpetrator was not a striker, it handled the disciplinary action differently, solely for that reason as it has provided no other reason for doing so. To permit an employer to run two different disciplinary systems, one for strikers and one for nonstrikers who engage in identical conduct, would only encourage the kind of disparate treatment the Board has found to be discriminatory.[121]

I have previously found that strikers Ryan and Perkins did not steal newspapers and, therefore, did not engage in the alleged misconduct for which they were discharged. I also find, based on the Respondent's treatment of Jones and Williams, that they were victims of disparate treatment and that their discharges were unlawful for that reason as well. They are the only ones affected by this evidence of disparate treatment, as I find that there are no other comparable instances in which a striker was discharged by any of the Respondents for behavior that can be considered to be of a similar or lesser degree of seriousness.

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[121] I find that an incident involving carrier Bertha Bryant-Smith, who apparently violated the policy concerning covering shortages of newspapers, by purchasing the papers she needed from a rack, is distinguishable and does not constitute evidence of disparate treatment because it did not involve a theft.

G. No Evidence of Disparate Treatment

In each of the following cases, I find that counsel for the General Counsel have failed to establish that the Respondent involved was guilty of disparate treatment.

1. Incident Involving Anthony Arrant

James Thomas was a DNA employee who was picketing at the Centerline Distribution Center during the early morning hours of September 24, 1995. He testified that, as he was patrolling in the driveway, a pickup truck approached and stopped. As he started to pass in front of the pickup, it lunged forward and struck him in the right leg. He was taken to the hospital and he suffered a badly bruised right ankle, a broken bone in his left hand, and injuries to his shoulder that required two surgeries and a year of physical therapy. He sued the driver and there was a settlement with the driver's insurance company. The police came to the scene but neither he nor the driver was issued a citation. He did not make any complaint to the DNA as result of this incident.

The vehicle that allegedly ran into Thomas was driven by an independent carrier, Anthony Arrant, who was entering the distribution center to get his newspapers. Daniel Holka, Arrant's district supervisor, testified that, on the morning of the incident, Arrant came to him immediately after it happened and told him that he did not strike Thomas with his vehicle and that he had taken a dive. Arrant's girlfriend who was in the vehicle confirmed this. He reviewed a videotape of the incident and talked with the investigating police officers who told him the had been no accident and that Arrant had done nothing wrong. He also examined Arrant's vehicle and saw no scratches or damage. He also said that he had previously observed Arrant crossing the picket line and that

he was very cautious and followed the prescribed procedures. Holka concluded that Arrant was not at fault and took no action against him.

Analysis and Conclusions

The brief videotape of the incident in the record shows that Arrant's vehicle is stopped at the entrance to the driveway and that as it slowly moved forward Thomas had already cleared the front of its bumper and is walking away from the vehicle rather than starting to cross in front of it as he claimed. While the videotape does not conclusively establish that Thomas intentionally made contact with Arrant's vehicle, it does show that any contact was slight and unintentional. The vehicle, which had slowly moved forward only a few feet, stopped immediately after Thomas fell down. I find that under the circumstances, particularly, since a videotape of the incident available to him, there was no reason for Holka to have interviewed the picketers at the scene and his failure to do so does not establish that his investigation was insufficient. I also find that the Respondent's failure to call Arrant as a witness at the hearing does not warrant an adverse inference, as Thomas confirmed that he had denied striking him. Holka's credible testimony establishes that he had a reasonable belief that Arrant had not acted maliciously or negligently, that had done nothing wrong, and that no disciplinary action was appropriate. I find that the general Counsel has not established that the Respondent had knowledge that Arrant was guilty of any misconduct or that its failure to take disciplinary action against him constituted disparate treatment.

2. Incidents Involving Tanisha Boyd, et al.

Counsel for the General Counsel introduced various disciplinary records of the Respondent indicating that during the first half of 1996, Tanisha Boyd and Kim Pearson, DNA employees at the North Plant, were involved in a series of verbal and physical altercations at work with coworkers, Joy Walton and Alicia Turner. The records and the testimony of a number of supervisors, who were involved in trying to sort out the various incidents and accusations the two factions made against one another, indicate that there was usually no clear evidence as to what happened or who had instigated or provoked any particular incident. The employees were given verbal and written reprimands and directed to the Employee Assistance Program to resolve their differences. Eventually, Boyd was discharged and Walton was given a suspension.

Analysis and Conclusions

This evidence is alleged to establish that these nonstriking employees were treated differently than strikers who were terminated, in that they were given opportunities to explain their actions and were at least initially given discipline less than discharge. I find nothing to establish that any of the employees involved here had ever participated in the strike or that the arguments or altercations in which they were involved had any relationship to the strike; consequently, I find there is no evidence of disparate treatment of the type contemplated in *Aztec Bus Lines*, supra, and similar decisions, discussed above.

3. Incident Involving Brian Carter

Early on the morning of October 3, 1995, a DNA delivery truck driven by Brian Carter struck and ran over a picketer

named Dennis Mikonczyk while exiting the Clayton Street Distribution Center. No disciplinary action was taken against Carter by the Respondent as result of the incident.

Neither Carter nor Mikonczyk was called as a witness at the hearing. Kim Davis, is a DNA employee who was driving the truck immediately behind Carter's when it exited the facility that night. She testified that Carter was tailgating the truck in front of him, that he did not stop at the sidewalk, but proceeded out into the street where he hit and ran over one of the picketers who was standing by the curb. He continued forward and left the area. She credibly testified that, when she worked at the Clayton Street facility, Bill Winston was one of the supervisors there. She said that almost every day Winston stressed the fact that, as they exited the facility, each driver was "to stop at the sidewalk, let the picketers walk in front of our truck and once back again, then proceed."

The record also contains a videotape of the incident which shows a number of trucks exiting the facility. With the exception of that driven by Carter, each comes to a complete stop at the picket line and allows the picketers to clear before proceeding. Carter's truck, which is closely following the one in front of it, does not stop. As it makes a right turn into the street, it strikes and runs over Mikonczyk, then drives away without stopping.

Analysis and Conclusions

I find that the evidence concerning this incident establishes that Carter violated the Respondent's rule concerning the procedure drivers were to follow in exiting the Clayton Street facility and, as a result, his truck struck, ran over, and seriously injured a picketer. The credible and uncontradicted testimony of testimony of Davis, a strike replacement worker

and current employee, was that every driver was to make a complete stop and permit the picketers to cross in front of his or her vehicle before proceeding and that Winston stressed that rule on an almost daily basis.[122] Winston was not called as a witness. Consequently, I infer that his testimony would not have contradicted that of Davis. The Respondent points to testimony of Taylor which it claims establishes that no such rule existed. After a labored attempt to explain his general understanding of when a driver was required to stop at a picket line, Taylor testified as follows:

> Q. (By Mr. Canfield) I guess, Mr. Taylor, what I'm asking you is what you understood the instructions to drivers to be?
> A. I understood the instructions were to stop.

I find nothing in Taylor's testimony contradicts Davis' testimony that drivers at the Clayton Street facility were repeatedly told that they must stop at the sidewalk before crossing the picket line.

I also find that the Respondent has failed to establish that it made a thorough investigation of this incident. Unlike the many incidents involving disciplinary action taken against strikers for alleged picket line misconduct, including that which occurred immediately after Carter ran over Mikonczyk, neither Taylor nor Kelleher, who made the decisions for the DNA relating to the picket line misconduct, was involved.

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[122] In its brief, the Respondent contends that Davis said the rule was inapplicable if the police were present and there was a clear path. What she said was that if the police had opened up a picket line for a group of trucks to go through at the same time, each truck would not have to stop. In any event, that clearly was not the situation on October 3.

Instead, the decision not to discipline Carter was made by a low-level supervisor.

The evidence shows that the Respondent's only investigation of this incident was done by Single Copy Manager Roger Payton and consisted of his talking to Carter, Winston and Bryce Kahn, a security supervisor at the facility, on the morning of October 3. He talked to Winston when he arrived at the facility and was told that there had been an accident in which a picketer "was possibly hit" by Carter's vehicle and that Carter was at the police station. Winston said that, as Carter was leaving the distribution center, a picketer with a picket sign came running towards his truck and attempted to jump up onto his bumper so that he could cover the windshield with his picket sign. As he jumped, he lost his balance, fell and "the wheel or whatever had hit him." Immediately thereafter, Payton spoke to Kahn who told him "pretty much identically" what Winston had told him. He spoke to Carter when he returned from the police station on the morning of the incident. Carter told him that the police had taken his statement, looked at the video of the incident, concluded that he was not at fault and released him. Payton did not ask Carter for his version of the incident or look at the videotape before deciding that no disciplinary action should be taken.[123]

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[123] The Respondent contends that Carter was affected by the fact that there had been a violent demonstration at the Clayton Street facility a few days before and because his personal vehicle had been damaged there. It also contends that Carter was blinded by a spotlight being used by the picketers. Since Payton did not ask Carter about the incident on October 3, he could not have known or considered Carter's state of mind or whether he was affected by a spotlight when he made his decision not to discipline him. Payton also implied that he was aware that Mikonczyk had a blood alcohol

The contrast between Payton's actions concerning Carter's running a picketer over with his truck and those involving a complaint that Carter had been abusive to a store owner who sold the Respondents' newspapers is striking. In the latter case, Payton received a complaint that on October 20, 1995, Carter was verbally abusive, tried to force his way into the store office, and pushed the store owner during a billing dispute. After receiving the complaint, Payton went to the store, talked to the owner, and reviewed a security videotape. He then talked to Carter and got his version of the incident. Although the videotape did not show Carter pushing the owner and he denied trying to force his way into the office, Payton suspended him for 3 days and asked for his resignation "because of the severity of the incident."

In summary, the evidence shows that on October 3, Carter clearly violated the Respondent's rule that all drivers stop at the sidewalk before exiting the Clayton Street facility. This resulted in a picketer being run over and seriously injured. Payton, who investigated the incident, accepted Carter's self-serving statement that he had been exonerated by the police and Winston's description of the incident, while at the same time failing to review a videotape that would have shown that description was questionable. It did not interview any other witnesses to the incident or get Carter's version of what happened before concluding that no discipline was warranted.

The Board has found that an employer's failure to make a thorough inquiry into apparent misconduct by nonstriking

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level over the limit for intoxication when he made his decision. I did not believe him. It appears that information did not become available to the Respondent until much later, in connection with Mikonczyk's lawsuit against it.

employees can constitute evidence of disparate treatment. See *Aztec Bus Lines*, supra at 1029. Here, while it is arguable that the Respondent's investigation was less than thorough, I find there was no disparate treatment because Carter's underlying actions did not involve serious misconduct. All of the disciplinary actions taken by the Respondents against striking employees for alleged picket line misconduct in this case were based on intentional acts, not on acts of inadvertence or negligence. Here, the evidence shows nothing more than Carter failing to come to a complete stop at the picket line before proceeding into the street. While this had the unfortunate consequence of a picketer being injured, there is no evidence establishing that it was anything but an accident or that the Respondent had any reason to believe otherwise. Although counsel for the General Counsel apparently contend that Carter intentionally ran over Mikonczyk, they have presented no evidence which proves that he did. Their own witness, Davis, testified that she heard Winston contact Carter by radio after the incident to tell him to return to the facility. She said that when Winston told him that it was because he had hit someone, Carter sounded incredulous. Moreover, although the police investigated the incident, there is no evidence that Carter was arrested or charged with any violation as a result. I find that the evidence establishes only that Carter violated the rule about coming to a full stop before entering the street. This did not constitute "serious misconduct" as that term is used in *Clear Pine Mouldings*.

4. Incident Involving Bonita Chapman

Counsel for the General Counsel introduced records indicating that DNA employee Bonita Chapman was suspended and later discharged for an incident in which she left her machine while it was running and started "fighting" with another machine operator, Derain Bowers, on August

16, 1996. Neither Chapman nor Bowers appeared as a witness. Supervisor Mike Martin testified that he saw Chapman leave her machine, yell, and scream at Bowers, and run towards her for unknown reasons. Chapman was intercepted and brought into the office. Based on his observation of her conduct, he suspended Chapman for 3 days and recommended that she be discharged for leaving and shutting down her machine and causing a commotion. A Personnel Action Form relating to Chapman's discharge states that she was discharged for arguing and threatening another employee.

Analysis and Conclusions

It is not clear to me what this minimal evidence concerning Chapman is supposed to prove. From all that appears, she was discharged for misconduct while at work. There is no evidence that her misconduct was related to the strike or that she was treated more leniently than any discharged striker. I find there is no evidence of disparate treatment here.

5. Incident Involving Warren Christian and Michael Henry

Counsel for the General Counsel introduced records showing that on February 2, 1996, DNA driver Warren Christian was involved in a dispute with Supervisor Michael Henry over a transportation receipt. Henry alleged that Christian had punched him in the eye and a number of witness statements appear to support him, at least to the extent that they saw redness around his eye after the incident. Christian denied punching Henry. Neither was called as a witness at the hearing. DNA Vice President of Human Resources Randi Austin credibly testified that she conducted the investigation

into this incident. She reviewed the witness statements, written statements from Christian and Henry, and met with both men and their supervisors. She said that Christian vehemently denied Henry's claim that Christian had struck him, that Henry admitted being partly responsible for the escalation of the incident, that Christian's statements about the incident were more consistent than Henry's, and that Henry had a history of racial bias and being hot-headed. Christian is an African-American. She was not convinced that Henry had in fact been struck by Christian and she concluded that both men shared part of the blame for the incident. Christian was suspended for 10 days and required to enter the Employee Assistance Program. Henry was demoted.

Analysis and Conclusions

I find that the evidence fails to establish that this incident was related to the strike in any way or that it could be considered so comparable to any incident involving a striking employee discharged for strike misconduct that it constitutes evidence of disparate treatment. The credible testimony of Austin shows that she fully investigated the incident, that she concluded that both parties were at fault, that there was no physical contact, and that she took appropriate disciplinary action against both. Insofar as the General Counsel contends that the Respondent used a double standard because Austin displayed a greater "degree of skepticism" in judging this matter than Kelleher did in reviewing claims of striker misconduct, I do not agree and find there is no evidence of disparate treatment.

6. Incidents Involving Demingus Coates

Demingus Coates was employed by the DNA as a strike replacement in the maintenance department. He was

discharged by letter, dated December 20, 1996, for assaulting and intimidating picketers by driving his vehicle onto the sidewalk. There is evidence that after this incident occurred on September 20, 1996, the DNA assigned one of its attorneys to assist Coates in getting out of jail and to represent him at a preliminary hearing on the criminal charges brought against him. Counsel for the General Counsel contend that this is evidence of disparate treatment because, although he was less than an exemplary employee, the Respondent provided legal representation for him but did not provide such representation for strikers who were charged with crimes related to the strike and because it did not immediately discharge him.

The credible and uncontradicted testimony of John Taylor was that, after Coates was charged with assaulting picketers, he told Taylor that, as he was leaving work on the night of the incident, several picketers followed him to his vehicle which was parked on the street. The picketers surrounded the vehicle and began to kick it. Coates said that he drove up on the sidewalk to escape from them. Some weeks later he saw a copy of a Detroit Police report that indicated that Coates had told a police officer that he attempted to run over the picketers. After the Respondent received that information, Coates was terminated. Taylor also testified that, if employees of any of the three Respondents are arrested or sued in civil matters connected to their employment, it is their policy to provide them with legal representation. Counsel for the General Counsel also introduced records from Coates' personnel file showing that during his employment he had been the subject of 2 sexual harassment complaints, neither of which resulted in discipline; that he was issued a verbal warning for tardiness and a written warning for taking an unauthorized break; and that he had caused accidental damage to a candy machine.

I find that the fact that the Respondent, in accordance with its established policy, provided legal counsel in the preliminary stages of this criminal matter to an employee whom it initially had reason to believe was a victim rather than a perpetrator of strike-related misconduct does not constitute evidence of disparate treatment. Counsel for the General Counsel apparently contend that it did not act quickly enough to end that representation and terminate Coates once it became aware of the evidence against him at the preliminary hearing in which one its attorneys participated. I do not agree. The evidence shows that at the preliminary hearing, on November 21, 1996, a police officer testified that Coates had given a statement in which he said that after 6 picketers had rushed at him yelling racial epithets and striking his vehicle, he made a U-turn and started chasing them with his car, driving onto the sidewalk while doing so. It appears that this is the report that Taylor referenced in his testimony. There is nothing to suggest that the Respondent was aware of that admission before. Coates was terminated on December 20, 1996.

I find no merit in the argument that the fact the Respondent did not provide legal counsel to striking employees who were arrested and/or charged with strike-related misconduct (which in most, if not all, cases was directed at the Respondents, their nonstriking employees, customers, and contractors) is evidence of disparate treatment. I also find that the other complaints against and warnings to Coates, none of which were related to the strike or was handled by the DNA as such or involved conduct similar to that for which strikers were disciplined, do not constitute evidence of disparate treatment.

7. Incident Involving Daryl Dupont

There was evidence that a DNA mailroom employee named Mike Kirkpatrick had alleged that an employee named Daryl Dupont had threatened to shoot him. No disciplinary action was taken against Dupont as a result. None of the individuals involved in the incident giving rise to this allegation appeared as a witness at the hearing. Product Support Manager Richard Fischer testified that he became aware of Kirkpatrick's allegation after he learned that Kirkpatrick had resigned and he conducted an investigation into what had happened. He testified that he has known Kirkpatrick for about 15 years and that he is a very nervous, hyper individual who has had a number of family problems and takes several medications. Fischer said that he has a handicapped son of his own and that as a result he has always treated Kirkpatrick with special care and would not tolerate anyone harassing him. He interviewed Kirkpatrick who told him that Dupont, a member of a 4-man crew that he was working on, had threatened to take a gun and shoot him after they had a dispute over taking a break. After talking to Kirkpatrick, he interviewed the other 3 employees. Their consistent stories convinced him that when they were about three-quarters finished unloading a truck, Kirkpatrick said that he was going on a break. The others finished unloading the truck and they later had a verbal dispute about how the work was done. All three denied that there had been any threats made by anyone. Fischer said that he concluded that there had been no threat and that Kirkpatrick, who had previously told him that there were people in his neighborhood with guns who were out to get him, had overreacted and got angry when the others questioned his lack of cooperation. He talked Kirkpatrick into returning to work and referred him to the Employee Assistance Program.

Analysis and Conclusions

Based on the credible and uncontradicted testimony of Fischer, I find that no threat was made, that there was no basis for any disciplinary action to be taken against Dupont or the other members of the crew on which Kirkpatrick was working, and that counsel for the General Counsel have not established any disparate treatment.

8. Incidents Involving Robert Gibson

Counsel for the General Counsel introduced records indicating that Robert Gibson, a crew director at the North Plant, had been given a 3-day suspension for threatening Corey Imes on September 19, 1996, and that he was accused of assaulting and threatening Jamie Beyerland on the same date. Gibson, Imes, and Beyerland did not testify at the hearing. Quality Assurance Director Michael Mauder testified that Imes had reported to him that Gibson asked him to move a female member of Imes' press crew, whom Gibson was dating, to a different position. Imes responded that it was his decision not Gibson's and Gibson said, "If we can't resolve this here, maybe we need to take this outside." Mauder questioned Gibson about this and he admitted it was true and said he was sorry about it. Mauder also testified that later that same night, Gibson saw Imes and Beyerland laughing together and thought they were making fun of him and he went over and spoke to them about it. As Gibson was walking away he threw a soda can towards a trash can and it bounced off the can and hit Beyerland's leg. When Mauder spoke to Beyerland, he said he did not like the way Gibson had spoken to him but did not tell him what was said and did not say that Gibson had threatened him or made any physical contact with him that night. Mauder gave Gibson a 3-day suspension for his comments to Imes.

Analysis and Conclusions

I find that the evidence fails to establish that these minor incidents had any relationship to the strike or that they involved anything more than brief verbal exchanges between Gibson and two other crew leaders, neither of which resulted in any physical contact. I find there is no evidence of disparate treatment here.

9. Incident Involving Ernest Hale

Joseph Moore testified that on the morning of July 18, 1995, he was picketing at the Lincoln Park Distribution Center. He saw a car come into the driveway and saw the person next to him jump out of the way. He does not remember what happened next or being struck by the vehicle, but he was lying on the ground. He was taken away by ambulance and received medical attention for a closed head injury and bruises. He said that he did not inform the DNA about the incident but he filed suit against the driver of the vehicle, Ernest Hale, and got a judgment against him.

Ernest Hale testified that he is a subcontractor for his father who is an independent contractor engaged in the home delivery of The Free Press. On July 18, 1995, he drove to the Lincoln Park Distribution Center to pick up newspapers. He saw four or five pickets as he entered the driveway. As he approached them, he stopped about 5 feet from where they were standing. Two of the three, who were standing in front of him, walked to either side of his car and shouted obscenities at him. The third, whom he later learned was Moore, continued to stand in front of him facing him. He took his foot of the brake and let the car inch forward about a foot to see if Moore would move. He did not and Hale stopped again. At that point, he saw security guards

motioning to him to come forward. He inched forward another foot and stopped when Moore did not move. As he did so, Moore rolled to his right side onto his back on the ground. Hale said that his vehicle had not touched Moore. The security guards continued to motion to him to come in so he backed up a few feet and drove around Moore into the facility where he reported what happened to the manager and filled out an incident report. Two police officers came and asked to see his license and registration and later gave him a ticket for failing to yield to a pedestrian. He said that Moore was also issued a ticket and that both tickets were later dismissed by mutual agreement. Moore filed a lawsuit against him which was handled by his insurance company and has been concluded. He did not know if Moore received any cash settlement as a result.

William Kish is a police officer with the Lincoln Park Police Department who was in a patrol car observing the picketing at the time the incident happened. He said that he saw a vehicle driven by Hale attempt to enter the facility and stop at the picket line to let the picketers clear. The vehicle moved slightly forward and stopped again. He observed one of the picketers, Moore, turn and face the vehicle, then roll onto his back. He said that he had a clear view of the scene from about 30 feet away and that the vehicle did not strike the picketer. He said that he observed Moore on the ground and that he appeared to be feigning unconsciousness.

William Stille was the manager of the distribution center at the time of this incident. He credibly testified that he was informed of the incident by Hale who told him that someone had acted like they bumped into his car and fell. As he was talking to Hale, 2 police officers walked up and one said that he had seen the whole thing, that the person had taken a fall, that Hale did not hit him, and that there was no problem. He

did not consider taking disciplinary action against Hale because of what the police officer had told him.

Analysis and Conclusions

The General Counsel apparently contends that this incident is evidence of disparate treatment because Hale was not disciplined for running into Moore. I found the mutually corroborative testimony of Hale and Kish to be credible and persuasive. That of Moore, both about this incident and that which led to his discharge, was just the opposite. I find there is no credible evidence that Hale ran into Moore with his car. Moreover, I find that the Respondent had no reason to believe that he had. Likewise, it had no basis for concluding that Hale had done something, either intentionally or negligently, for which he should be disciplined. Consequently, its failure to discipline Hale does not establish that it used a double standard or that Hale was treated more leniently than any striker against whom disciplinary action was taken.

10. Incidents Involving Michael Henley

Counsel for the General Counsel introduced documents indicating that on January 15, 1998, Michael Henley, an assistant district supervisor at the Lawrence Distribution Center, was given a 30-day suspension and transferred for making inappropriate remarks to a number of female agents in violation of the DNA's sexual harassment policy. The evidence shows that the Respondent received a complaint in December 1997 that Henley had made inappropriate sexual remarks to a carrier, which he denied. Neither Henley nor any of the persons who complained about his conduct were called as witnesses at the hearing. The credible testimony of DNA Employee Relations Manager Sherry Huffman establishes that, after receiving the complaint, she made an

extensive investigation and sifted through a number of conflicting allegations, including, that the complaining carrier had tried to enlist Henley in a scheme to sue the DNA over a false sexual harassment claim. She concluded that Henley had in fact made some inappropriate sexual comments to more than one female, but that his conduct was not obscene and did not involve any physical contact. As a result, she determined that a 30-day suspension and transfer were appropriate punishment.

Analysis and Conclusions

I find no evidence that the Respondent's actions in investigating and disciplining Henley establish that it was guilty of disparate treatment. The complaint giving rise to the investigation did not arise until long after the strike had ended and there is no evidence that it was in any way connected to the strike or that Henley was treated more leniently because he did not participate in the strike. It appears that the Respondent investigated the allegations and took remedial action based on its sexual harassment policy. I find that counsel for the General Counsel have failed to establish that the investigation and disciplinary action taken as a result did not fully comport with that policy or that the policy was used as grounds for disciplining strikers. Inasmuch as the evidence concerning Henley's conduct fails to establish that he repeatedly made obscene, abusive, and/or publicly demeaning comments of a sexual nature to any female; they have also failed to establish that Henley's actions were comparable to those of any striker who was discharged.

11. Incidents Involving Joseph Kelleher

On November 17, 1997, DNA employee Joseph Kelleher was stopped by a Sterling Heights police officer Kenneth

Michalski, who issued him a traffic ticket for speeding and making an improper turn. When Kelleher was stopped, he pulled into a parking lot belonging to the Excello Company where Michalski wrote the ticket. After receiving the ticket, Kelleher made a U-turn and exited the parking lot at a rapid rate of speed and traveled a short distance to a DNA facility where he pulled in. Michalski and Sergeant James Steffes, who had joined Michalski during the first stop, followed Kelleher and again pulled him over inside the gate. Kelleher was issued a second ticket by Steffes for failing to stop before exiting the Excello lot. When that was finished, Kelleher rapidly accelerated and traveled about 75 feet and recklessly pulled into a parking space. The police officers followed, stopped him again and arrested him, charging him with reckless driving. There were a few people in the parking lot at the time but no one but the police officers were anywhere near Kelleher's vehicle. Before leaving the DNA facility, Steffes was approached by a female who identified herself as being from security and inquired what had happened. He also obtained witness statements from two security guards who were in the parking lot. The foregoing findings are based on the credible and uncontradicted testimony of Michalski and Steffes. A copy of a plea agreement in the record indicates that the reckless driving charge against Kelleher was dismissed and that he pled "responsible" to the charge of failing to stop before leaving the driveway. There is no evidence that any disciplinary action was taken against Kelleher by the DNA because of these incidents.

Analysis and Conclusions

While there is circumstantial evidence that the Respondent was aware of the incidents, I find that its failure to discipline Kelleher as a result does not constitute evidence of disparate treatment. There is no evidence that these traffic violations

had anything to do with the strike, which had ended several months before. There is nothing to indicate that Kelleher was treated leniently because of the fact that he did not participate in the strike. There is no evidence that they even had anything to do with Kelleher's employment. He was not employed as a driver, was not on duty at the time, and was not driving a DNA vehicle. The only incident of the three that could possibly have any bearing on this case is the one involving the ticket that was issued to him on DNA property for reckless driving. The evidence shows that the citation for that violation was dismissed in a plea bargain agreement. Aside from that, I find there is no evidence that the incident in the DNA parking lot was similar to any for which any striker was discharged. There were no employees in the vicinity of Kelleher's vehicle when he squealed his tires and sped away from the police officers and no one was endangered by his actions. Consequently, it was not remotely comparable to the incident in which striker Joseph Silva was discharged for, among other things, chasing after and attempting to force a carrier's vehicle off the road or that in which striker Franklin Weston was discharged for allegedly accelerating his van towards nonstriking employees who were crossing the street near The News building on their way to work.[124]

12. Incident Involving David Kingsbury

Striker Sam Rodriguez testified that on July 14, 1995, he was picketing at Flint Distribution Center. As Rodriguez was crossing in front of a vehicle that was exiting the facility, he stopped momentarily and the driver accelerated towards him causing Rodriguez to be thrown onto the hood. The vehicle

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[124] The complaint allegation concerning Weston, who was discharged for that incident, has been settled and dismissed.

continued to accelerate, traveling about 25 to 30 feet, before Rodriguez threw himself off the vehicle onto the road cutting his knees and injuring his back. The vehicle drove away and a police officer who was parked nearby pursued the vehicle, driven by newspaper carrier David Kingsbury. Kingsbury was charged with assault and battery as a result of the incident. Rodriguez said that after the incident occurred a supervisor, Mike Crandell, came out of the facility and talked with him and the police.

David Kingsbury testified that he went to the facility that morning to pick up newspapers for delivery. As he was driving out, there were pickets walking across the driveway. He stopped to let them pass. When they cleared his vehicle he began to inch forward. As he did so one of the pickets jumped up on his vehicle and grabbed onto the windshield wipers. He continued forward at about 5 miles per hour and, as he made a right turn, he struck the curb and the picket fell off his vehicle. He continued to drive about a quarter of a mile when he was pulled over by a police officer, arrested, and charged with assault. He said that he had a short discussion about the incident with Crandell but that he did ask and Kingsbury did not tell him whether or not he had hit Rodriguez. Kingsbury's wife Rita, who was in the vehicle that day, testified that as they left the facility there were two pickets standing in front of their vehicle yelling and hitting the vehicle with their signs. They had to stop 2 or 3 times as the pickets moved in front of them. As they got to the end of the driveway, one of the pickets climbed onto the hood and began holding onto the windshield wipers and banging them. They bumped over the curb and the picket fell off.

Crandell testified that he is the DNA's state manager with responsibility for circulation outside of the Detroit metro area. He said that on the morning of July 14, 1995, as he was

preparing to leave the Flint facility, he observed 2 pickets, Rodriguez and another whose name he could not recall, patrolling across the driveway. Kingsbury was one of the last carriers to exit the facility. As Crandell was getting into his car, he heard the squealing of tires from Kingsbury's vehicle and saw him driving down the road "a bit faster" than he should have. He also saw a police officer jump in his car and turn around and Rodriguez walking back towards the driveway. He went over to Rodriguez, whose knee was bleeding and who was obviously upset, and tried to settle him down. Rodriguez did not tell him what happened but said only "look what they did to me." Crandell said that Kingsbury told him that he made a stop in the driveway, the picketers were on both sides of his vehicle. As he began to roll forward, Rodriguez went around in front of the vehicle. As he rolled slightly forward, Rodriguez jumped up onto his vehicle. Crandell said that he was aware that Kingsbury had been arrested and charged with a felony assault. He said that he did not take any action against Kingsbury because he said that he had no intent to hit or injure Rodriguez and because Crandell did not see Rodriguez actually being hit. He also took into consideration that Kingsbury was not used to dealing with violent picketers and this was very upsetting to him. Although he did not terminate Kingsbury's contract, he told him and other contractors that "this kind of an incident could not happen again, ever" and that "termination was imminent if it were to happen again."

A court document in the record shows that Kingsbury pled no contest to a charge of assault and battery and was fined. According to Kingsbury, the charge was reduced to a misdemeanor through a plea bargain.

Analysis and Conclusions

I find that the evidence indicates that the Respondent made a less than thorough investigation of this incident. Crandell made no significant inquiry beyond accepting the self-serving statements of Kingsbury and his wife that he had done nothing wrong. This was in the face of Crandell's own personal observation that Kingsbury had left the scene at an excessive rate of speed and his knowledge that Kingsbury had been chased down by the police, arrested, and charged with a felony. He had the opportunity to speak with Rodriguez immediately after the incident, but he did not ask him what happened. He went to the police station while Kingsbury was in custody, but he apparently made no effort, then or later, to talk with the police officer who witnessed the incident and made the arrest or to obtain a copy of the police report about it. The action he did take raises the suspicion that he did not believe Kingsbury was blameless. If that were the case and Kingsbury was a victim rather than at fault, there was no reason for Crandell to tell him that "this kind of an incident could not happen again, ever" and if it did he would be terminated.[125]

That being said, I find that the Respondent's failure to conduct a more complete investigation of the incident is not the equivalent of a finding that it ignored the incident or that it knew that Kingsbury was guilty of serious misconduct. Moreover, this record fails to establish by a preponderance of the evidence that he was in fact guilty of such misconduct, that the Respondent had evidence that he was, or that its

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[125] I find that Crandell's testimony establishes that the Respondent had the contractual right to terminate contractors who engaged in misconduct.

failure to discipline him was based on a double standard. I did not credit Rodriguez' testimony about his discharge, discussed above, and I find no reason to credit him over the mutually corroborative testimony of the Kingsburys about this incident. Having observed their demeanor at the hearing, I found no reason to doubt their testimony, that the vehicle did not strike Rodriguez as he claimed, notwithstanding its self-serving nature. Neither the fact that Kingsbury was arrested nor his conviction on a no contest plea establish that he was guilty of assault. There were at least two people who presumably could have corroborated Rodriguez's story, the other picket and the police officer who arrested Kingsbury, but neither was called as a witness. Since the evidence fails to establish that Kingsbury engaged in serious misconduct by deliberately assaulting Rodriguez with his vehicle, the Respondent's failure to take disciplinary action against him does not constitute disparate treatment.

13. Incident Involving Anthony Love and Sharon Hamil

Counsel for the General Counsel introduced a letter, dated January 9, 1998, from Regional Manager Jeff Gibson to DNA District Supervisor Anthony Love. Gibson makes reference to a "physical altercation" between Love and a carrier, Sharon Hamil, on November 29, 1997, and states that "the evidence is inconclusive as to who instigated this matter and what actually took place." No disciplinary action was taken against Love. Neither Love nor Hamil was called as a witness at the hearing. Gibson did testify and added little information to that in his letter. He said that he knew some kind of argument and altercation took place but there were no witnesses or evidence from which he could determine what happened. He issued a similar letter to Hamil but took no disciplinary action against her.

Analysis and Conclusions

I find the minimal evidence in the record concerning this incident proves nothing. There is no evidence that it had any relationship to the strike or that the Respondent applied a double standard in dealing with it. There is no evidence of disparate treatment here.

14. Incidents Involving Steve Mentzer

Counsel for the General Counsel introduced documents indicating that DNA truckdriver Steve Mentzer was issued a 1-day suspension for an altercation with another driver on August 28, 1997, and was given a written warning for driving a company vehicle recklessly in the North Plant parking lot on February 26, 1998. Mentzer credibly testified that in the first incident he was sitting in his supervisor's office chatting when another driver came in to complain about an assignment he was given. As the other driver was talking, Mentzer reached over and playfully tugged on his pants leg. The driver was upset by his actions. This resulted in his being called in by supervisors and told that he was being disciplined for sexual harassment because touching another employee in any manner was unacceptable. In the other incident, after the strike had ended, Mentzer said that he was moving a semi to the loading dock at the North Plant when an employee defiantly stepped in front of his truck with his hands on his hips. When he tried to go around him, the front tire threw up standing rainwater on some employees standing nearby. He was told that they went to security and complained that he had almost hit them. He said that he did not drive recklessly and did not exceed the posted speed limit of 15 miles per hour. He said that he did not even know that the employees had been splashed until they said something to him later and he apologized to them. No one who witnessed the splashing incident or who was

involved in the disciplinary action taken against Mentzer as a result was called as a witness at the hearing.

Analysis and Conclusions

I credit the testimony of Mentzer and find that these incidents occurred as he described them. I find that neither of the disciplinary actions taken against him constitute evidence of disparate treatment. There is no evidence that either incident was related to the strike or that Mentzer was treated leniently because he did not participate in the strike. It appears that in the first incident the Respondent investigated and took remedial action based on its sexual harassment policy. I find that counsel for the General Counsel have failed to establish that the investigation and disciplinary action taken as a result did not fully comport with that policy or that the policy was used as grounds for disciplining strikers. The evidence in this record concerning the second incident fails to establish that Mentzer drove in a reckless manner, that he intentionally splashed anyone, or that anyone was endangered by his driving. I find neither of these incidents is comparable to any for which any striker was disciplined.

15. Incident Involving Marcia Murphy

Counsel for the General Counsel introduced records indicating that, on November 8, 1997, DNA employee Marcia Murphy was sent home for the rest of that day and suspended for a week for insubordination. No one who was involved in the incident or witnessed it was called as a witness. North Plant Director of Human Resources James Barnett testified that he made the decision to discipline Murphy. He said that Supervisor Louis Monroig had spoken to and tried to calm down Murphy who was angry and confrontational during the shift. As he walked away, Murphy

had said, "he better walk away or I will kick his ass because I'm not one of his bitches." Monroig did not hear this but was told what Murphy had said by a machine operator. After Monroig wrote up a summary of what happened that day, Barnett investigated the incident. He determined that Murphy should be suspended for a week for insubordinate conduct to her supervisor. He said that he did not consider Murphy's comment, which was not made directly to Monroig, to constitute a threat of physical harm.

Analysis and Conclusions

Although Barnett's testimony differed from the report Monroig filed, which states that Monroig did hear Murphy's comment, I found Barnett to be a credible witness and credit his version of the incident. He was testifying about what he was told when he investigated the incident, which included speaking with Monroig and the operator who reported Murphy's comment. I find that his credible testimony was not impeached by Monroig's written summary which was prepared before Barnett did his investigation. I also find that the punishment given Murphy for this incident does not constitute evidence that the Respondent used a double standard in disciplining nonstriking employees. As is discussed above, the degree of culpability arising from a threat to "kick ass" depends on all of the surrounding circumstances. Here, there is nothing to suggest that a physical altercation was likely to result from Murphy's comment or that Monroig was intimidated by it. Moreover, I find that there is no evidence that this incident had any relationship to the strike or that it was comparable to any

incident for which a striker was discharged.[126] Consequently, this is not evidence of disparate treatment.

16. Incident Involving Paul Nevil

Steven Munson, who was employed by the DNA as a mailer, credibly testified that on July 13, 1995, the night the strike began, he was picketing at the North Plant. At the request of strike organizers, he followed a DNA truck to see where it was taking newspapers for distribution to carriers so that a picket line could be set up there. As he was doing so, he noticed 2 vehicles with Huffmaster Associates security guards in them following him. Their vehicles rammed into his several times causing it to leave the road and go into a ditch. Munson drove to the Troy police station to file a complaint. The police informed him that they had already had a call from Huffmaster Associates saying that Munson had been driving erratically, had run into their vehicles, had lost control, and left the road. Munson was charged with reckless driving. He had a jury trial in which a videotape of the incident was shown and he was acquitted. Records introduced by the General Counsel show that, on August 31, 1995, Paul Nevil, a Huffmaster Associates security guard, pled guilty to a charge of reckless driving in connection with this incident and was sentenced to 20 days in jail.

Kelleher credibly testified that around the time the strike started the DNA was in the process of changing its security

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[126] The closest would be the incident which led to the discharge of News employee Marcus Franklin, in which he confronted a management on the street, threatened to kick his ass, and threatened to blow up his house. I find that incident clearly distinguishable from this one.

contractors. He said that he was not aware of any charges being brought against Nevil before the relationship with Huffmaster Associates had terminated at the end of August 1995. There is no evidence that any other representative of the Respondent had such knowledge. The General Counsel erroneously asserts that a DNA investigator, James Harrington, had filed a report about the incident and Nevil's conviction while Huffmaster was still performing services for the Respondent. Although that report appears to be dated "7/14/95," it is clear from its content that refers to the date of the incident and that it was not prepared until at least mid-July 1996, apparently, in connection with an investigation of Munson.

I find that the information concerning Nevil's misconduct was not known to the Respondent until long after Huffmaster was no longer performing services for it. At that point, there was nothing it could do about it. Consequently, there was no disparate treatment.

17. Incident at the North Plant on September 3, 1995

On the morning of September 3, 1995, the DNA attempted have a number of its trucks exit the North Plant using the 16 Mile Road gate which had not been used for some time. The gate, which is about 10 feet high and 30 to 40 feet across, was chained and padlocked. The lock had been damaged so that it could not be opened with a key. After an unsuccessful try by security guards to cut the chain, an attempt was made to break the chain by pushing against it with a truck. Rather than the chain breaking, the hinges on the gate gave way and it swung out into the driveway where a number of picketers were patrolling. Striking employee Marc Naumoff testified that he was hit by the gate and was

injured.[127] It is argued that this constituted a reckless, violent act and the fact that no one who was involved in it was disciplined is evidence of disparate treatment.

The evidence establishes that there had been a large demonstration in support of the strike going on at the North Plant since the previous afternoon. Several hundred people were demonstrating outside the Mound Road gate which was the one normally used by trucks to enter and leave to the plant. At around 3 a.m., approximately six trucks, flanked by a cordon of security guards, approached and attempted to exit through the 16 Mile Rd. gate. The only real factual dispute concerning this incident involves the speed the lead truck was travelling when it hit the gate and broke its hinges.

APT security guards David Walworth and Julius Johnson credibly testified that because the Mound Rd. gate was being blocked by a large number of demonstrators, the decision was made to open the 16 Mile Rd. gate, have 30 to 40 guards clear the driveway which was full of debris and star nails, and move the trucks out. However, they were unable to open the lock on the gate because it had been filled with plastic cement. The trucks were lined up and brought to about 15 feet from the gate and stopped while an attempt was made to cut the chain with bolt cutters which was unsuccessful. Walworth ordered the driver of the first truck to nudge the gate. He honked his horn several times and approached the gate at about 2 to 5 miles per hour. After about 45 seconds of pushing against the gate, the hinges on the left side gave way and the gate partially fell over onto one of the picketers. Walworth ordered the truck which had moved about a foot

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[127] Naumoff subsequently sued the DNA and the lawsuit was settled.

past the fence line to back up when he saw a picketer lying on the ground. The truck backed up and the gap in the fence was filled by three vans.

Naumoff testified that as the truck approached the gate it was gaining speed and crashed through the gate travelling at as much as 25 miles per hour. Steve Babson, a nonemployee who was there to support the strikers, testified that the truck did not move up to the gate and push against it, but accelerated towards the gate and struck it at a high rate of speed, causing the bottom of the gate to kick out into the driveway and strike a picketer. Michael Funke, another nonemployee supporter of the strike, testified that the lead truck accelerated into the gate which fell down in front of and underneath the truck slowing its progress. Donald Kummer, a retired Guild official who was there to support the strikers, testified the truck hit the gate like a battering ram going about 5 or 10 miles per hour and knocked it down.

Analysis and Conclusions

Having considered the descriptions of all of the witnesses on both sides, no two of which were exactly the same, I find it likely that each had a different impression of what they saw that morning and that their perceptions were colored by their points of view concerning the strike. For example, their versions ranged from the truck steadily accelerating up to 25 miles per hour, crashing through the gates, sending a picketer flying into the air, and continuing forward over the gate, to its creeping up to the gate, pushing on it for up to 45 seconds when it finally gave way, and the truck stopping within a foot of the gate. The security guards testified that there was a constant barrage of missiles and debris thrown by the picketers raining down on them while the union supporters saw little, if anything, being thrown. I find the truth probably

lies somewhere in between the various versions. If, in fact, the truck had crashed through the gate at 25 miles per hour and sent the gate flying into the crowd of picketers there would presumably been more than the one minor injury to Naumoff, who did not even leave the scene for at least 2 hours afterward.

While the attempt to break the chain by hitting the gate with a truck may have been ill-advised, I find no reason the conclude that it was anything other than an effort to get the trucks and the newspapers out of the plant. I find that this effort was not intended to harm the picketers outside the gate and was not so reckless or violent as to constitute serious misconduct on the part of the truck driver or Walworth, whose idea it was, or anyone else. Consequently, I find that the Respondent's failure to take disciplinary action against anyone as a result of this incident does not constitute evidence of disparate treatment.

18. Incidents Involving Sterling Peters

Counsel for the General Counsel introduced records indicating that DNA janitorial employee Sterling Peters was suspended for 8 days in June 1996 and was again suspended and discharged in July 1996. Neither Peters nor any of the persons who were involved in or witnessed the incidents which led to these disciplinary actions were called as witnesses at the hearing. The documents indicate that on June 15 Peters confronted employee Mark Dycus who had accused him of sleeping on the job. There was an argument which resulted in Peters' swinging a mop which struck another employee, Aggie Pelonial. North Plant Building Manager Willie Killebrew testified that he investigated the incident by talking to all those who were present and that he believed Peters' claim that he had grabbed the mop to defend himself

from Dycus and it accidentally struck Pelonial. Killebrew said that he doubted the veracity of Pelonial, based on a previous experience, and knew that the employees accusing Peters disliked him. He concluded that Peters should be suspended for unprofessional conduct because he had struck Pelonial with the mop. The second incident on July 5 involved an apparent attempt by Peters to hold up and rob several coworkers. He was discharged for this incident.

Analysis and Conclusions

There is no evidence that either of the incidents involving Peters was in any way related to the strike. The credible and uncontradicted testimony of Killebrew was that he did not believe most of the accusations leveled against Peters by 3 coworkers who disliked him, but that he did conclude that Peters should be suspended for accidentally striking Pelonial. Since the incident did not involve an intentional assault, it was not comparable to any of the picket line incidents for which strikers were discharged. I find this does not constitute evidence of disparate treatment.

19. Incidents Involving Robert Reynolds

Counsel for the General Counsel introduced a document indicating that, in January 1997, DNA employee Robert Reynolds was suspended for 5 days and transferred for violating its sexual harassment policy by making unwanted visits to the home of a female carrier. Neither Reynolds nor the carrier were called as witnesses at the hearing. Sherry Huffman testified that she received a complaint that Reynolds had made sexual comments to a female carrier. She met with the carrier who told her that Reynolds had followed her home and asked to come into her apartment which she refused. She also said that about a year before Reynolds had asked her for

sex and put his hand on her leg. She said that he had once come to her home on a morning when she was late for work and had banged on her windows apparently trying to wake her, then had some call her on the telephone. She interviewed Reynolds who admitted visiting the carrier's home but denied making sexual remarks to her. She spoke with others who worked at the same distribution center but got no confirmation of the carrier's allegations. She said that she concluded that Reynold's visit to the carrier's home was improper but she was unable to conclusively establish that he had in fact made sexual remarks or had touched the carrier, whom she described as a reluctant witness. She decided that a suspension and transfer was appropriate punishment.

Analysis and Conclusions

I find no evidence that the Respondent's actions in investigating and disciplining Reynolds establish that it was guilty of disparate treatment. There is no evidence that his conduct was in any way related to the strike or that Reynolds was treated more leniently because he did not participate in the strike. It appears that the Respondent investigated the allegations and took remedial action based on its sexual harassment policy. I find that counsel for the General Counsel have failed to establish that the investigation and disciplinary action taken as a result did not fully comport with that policy or that the policy was ever used to discipline strikers. At most, the Respondent had evidence that Reynolds made an unwanted visit to a female carrier's home. There is no evidence that he trespassed or was abusive or threatening; consequently, there is nothing to establish that his conduct was comparable to that for which any striker was disciplined.

20. Incident Involving April Roe

Counsel for the General Counsel introduced a document showing that DNA employee April Roe was issued a written reprimand for stopping her vehicle in the driveway at the North Plant to engage in a conversation with some individuals on January 24, 1998, thereby, temporarily impeding traffic from entering the plant and creating a safety hazard. Neither Roe nor anyone who observed this incident appeared as a witness at the hearing. Transportation Manager Larry Field testified that he received reports that, at different times, Roe and 3 other employees had stopped their vehicles while entering the plant and had spoken to people on the picket line for about 20 to 40 seconds. Each of the employees was issued an identical written reprimand for blocking ingress and egress to the parking lot. The other three employees, Nick Serra, Dana Donaldson, and James Walsh, were strikers who had come back to work after their Union's unconditional offer to return. After those three were reprimanded, he was contacted by Teamsters Local 372 President Dennis Romanowski who asked him to review videotapes to see if they really deserved the reprimands. Vice President of Operations Mike Quinn and Field looked at the videotapes and concluded that none of the three had actually impeded traffic because there was no one behind them for the few seconds that they stopped to speak with picketers. These reprimands were subsequently rescinded. Roe did not complain about the reprimand she received; consequently, it was not reviewed or rescinded.

Analysis and Conclusions

The disciplinary action taken against Roe had some tangential connection to the strike, which had officially ended nearly a year previously, in that she apparently stopped at a picket line and spoke with some of the people on it for a few

moments before entering to go to work. I find the evidence fails to establish that her conduct was sufficiently similar to that for which any striker was discharged to constitute evidence of disparate treatment. Counsel for the General Counsel contends that Roe's conduct was the same as that for which Daymon Hartley was discharged by The Free Press. I do not agree. Hartley, who was not employed at the North Plant, parked his vehicle in one of the lanes of the driveway, got out, and left it standing there for several minutes. While I have found that under the existing circumstances his doing so did not constitute serious misconduct, I also find that a nonemployee leaving a vehicle in a driveway is fundamentally different from an employee pausing for a few seconds to speak to someone before proceeding forward to enter and go to work.

21. Incident Involving Ernest Ruffin

Counsel for the General Counsel introduced documents indicating that DNA employee Ernest Ruffin was discharged in March 1996 for threatening a supervisor. They indicate that on March 13 Ruffin had told machine operator Joe Kelleher that he would "break [his] fucking face." The incident was reported to Packaging Superintendent Jack Latona who interviewed Ruffin and Kelleher. Ruffin denied making a threat but when another employee said that she had heard him do so, Latona recommended that he be terminated. Other documents show that sometime later Ruffin was reinstated, but do not indicate why. DNA Vice President of Human Resources Randi Austin testified that after his discharge, Ruffin contacted her and said that he felt he had been treated unfairly because of his race, which is African-American. Austin listened to Ruffin's story and talked with Joe Kelleher, whom she determined was not a supervisor and reviewed the documents on which his discharge had been based. She found

that Kelleher felt that Ruffin was not working as fast as he should have that day and told him so. Ruffin responded that if Kelleher had a problem he such speak to his supervisor. Instead of reporting this to their mutual supervisor, as he should have, Kelleher ordered Ruffin to leave the plant and attempted to grab the identification badge off Ruffin's shirt. It was then that Ruffin made the comment about breaking his face. She concluded that Ruffin may have been unfairly treated, in that his explanation of the incident had not been given credence because of his race. She also felt that he may have been provoked by Kelleher and that he should be given another chance. He was reinstated to a different position.

Analysis and Conclusions

Although the evidence shows that Ruffin was given a second chance after making a threat to break Kelleher's face, I find this does not constitute evidence of disparate treatment, as contemplated in *Aztec Bus Lines* and similar cases. First, there is no evidence that any striker was discharged for a similar comment under similar circumstances. More important, there is no evidence that the incident was in any way related to the strike. There is also nothing to establish that Austin's reconsideration of Ruffin's discharge was affected by the fact that he was not a striker. Rather, the reason was her conclusion that he may have been treated unfairly because of his race and because he may have been provoked by Kelleher's actions which, under the circumstances, she found to be beyond his authority and improper. I find this does not establish disparate treatment of any striker.

22. Incidents Involving Pat Shaw

Counsel for the General Counsel introduced a document indicating that in April 1996 DNA Supervisor Pat Shaw was suspended for 2 weeks, demoted, and transferred for acting in a manner that was sexually offensive to other employees and on another occasion making a racial remark. Neither Shaw nor the offended employees were called as witnesses at the hearing. Roger Payton and Randi Austin were involved in investigating Shaw's conduct. Their testimony was that, around March 27, 1996, Shaw told a sexually offensive joke and made sexual gestures in the presence of two female clerks. He had previously made a racially offensive remark and remarks about female workers not being capable or wanted in the workplace. There was no evidence that he had been abusive or involved in any physical contact. They concluded that he should not continue as a supervisor and should be suspended.

Analysis and Conclusions

There is no evidence that Shaw's actions were in any way connected to the strike or that Shaw was treated more leniently because he did not participate in the strike. It appears that the Respondent investigated the allegations and took remedial action based on its sexual and racial harassment policies. I find that counsel for the General Counsel have failed to establish that the investigation and disciplinary action taken as a result did not fully comport with those policies or that those policies were used as grounds for disciplining strikers. The evidence concerning Shaw's conduct also fails to establish that his racial comment was directed at other employees or that he repeatedly made obscene, abusive, and/or publicly demeaning comments of a sexual nature to any female; consequently, they have failed to establish that

Shaw's actions were comparable to those of any striker who was discharged. I find that the Respondent's actions in investigating and disciplining Shaw did not amount to disparate treatment.

23. Incident Involving Tyna Smith

Counsel for the General Counsel introduced a letter, dated May 1, 1997, from DNA Customer Service Manager Sandra Donald to employee Tyna Smith reprimanding Smith for making comments to coworkers, on April 18, 1997, to the effect that she would "do great bodily harm to upper management." Neither Smith nor anyone to whom her comments were made was called as a witness. Donald testified that she was told by an employee that while Smith and a bunch of coworkers were sitting around laughing and joking, the subject of the strike came up, and Smith made a comment about going "postal" and shooting upper management. Donald interviewed Smith, who admitted making the comments but said she was joking, and 2 other employees involved in the conversation. She concluded that Smith was not serious and her comments were not a threat. However, she also concluded that such comments were inappropriate in the work place and issued her a written warning.

Analysis and Conclusions

The credible and uncontradicted testimony of Donald establishes that the Respondent investigated the incident and concluded that Smith's comments were not serious and that they did not constitute a threat. It also establishes that Smith had gone out on strike and did not return to work until she was recalled after the Unions made an unconditional offer to return to work. Smith's comments did relate to the strike,

however, it is not clear to me what counsel for the General Counsel contend was the disparate treatment here. Since Smith is not an alleged discriminatee in this matter, it must be the fact that she was only reprimanded for this incident and not discharged. Since she was a returning striker and the Respondent has established that it did not believe she had made a threat, there is no disparate treatment.

24. Incident Involving Guy Sparks

Counsel for the General Counsel introduced records indicating that DNA truckdriver Guy Sparks had been given a 10-day suspension arising from an incident at the Flint Distribution Center on September 9, 1997. None of the people who were involved in or were witnesses to the incident were called as witnesses at the hearing. Mark Priesler, who was the DNA's operations manager at the time, testified that he received a report from Mike Crandell about a verbal confrontation involving Sparks and a contractor named Rodney Meyer. He asked two of his managers to interview Sparks and report to him. After reviewing their reports and a written statement by Meyer, he felt he needed more information and had several witnesses interviewed. He determined that Sparks had been abusive, used profanity, and threatened to kick Meyer's "ass." He also felt that Meyer may have spoken to Sparks in a provocative way. He determined that there was no physical contact involved and made the decision to suspend Sparks. He also understood that Crandell would take disciplinary action against Meyer.

Analysis and Conclusions

The credible and uncontradicted testimony of Priesler shows that he conducted an investigation of the incident and concluded that Sparks had been verbally abusive but that there

had been no physical contact with anyone and that he was not entirely to blame. There is no evidence that this incident had any relationship to the strike or that it was comparable to the actions for which any striker was discharged. I find that it does not constitute evidence of disparate treatment.

25. Incident Involving Neal Stephens

Neal Stephens has been employed by the DNA as a security supervisor at The News building for about 6 or 7 years. On January 22, 1996, Stephens was involved in an altercation with a striker named John Castine in an alley behind The Free Press building. As a result of this incident, Stephens was given a 2-day suspension by the DNA. He pled nolo contendere to a criminal charge of assault and battery in connection with the incident, was fined, and placed on probation for 1 year.

Stephens testified that as he left work that day he went to the alley behind The Free Press where his vehicle was parked. As he drove down the alley, he saw Castine standing in the middle of the alley. When he got within 5 feet of Castine he honked his horn. Castine, who was carrying a large bullhorn, turned and looked at him and turned on the bullhorn's siren. Stephens drove a few feet closer and stopped his vehicle to wait for Castine to get out of the way. As he did so Castine ran around the driver's side of the vehicle and Stephens heard a loud thump. He got out to see what had happened and Castine came out from behind a pillar and began cursing at him. Castine stepped towards him and tried to strike him with the bullhorn, but Stephens caught the arm of his jacket. Castine got away from his grasp and Stephens stepped back. Castine came at him again and Stephens, who said he feared that he was going to swing the bullhorn again, struck him on the left side of the head. Castine fell to the

ground. Stephens kicked the bullhorn away from him and walked away from him. Castine was taken from the scene in an ambulance. Stephens was subsequently arrested and criminally charged in connection with this incident. He pled not guilty but later changed his plea to nolo on the advice of counsel, after he was sued for damages by Castine. Stephens said that he did not touch Castine with his vehicle and had no idea why Castine came at and swung at him. He said after the incident that he saw a dent about 4 to 6 inches long on the driver's side door of his vehicle near the handle that had not been there before.

Castine was not called as witness and his absence has not been explained. Virginia Pullen testified that she was an employee of The Free Press, who was on strike and was picketing with Castine and others on January 22, 1996. She said that she saw Stephens approach the picket line in his vehicle and everyone but Castine moved out of the way. Stephens stopped about 5 feet from Castine then drove closer and she saw the car hit him, making his knees buckle. She did not recall if Stephens had blown the horn. Castine went around to the driver's side of the car. Stephens got out and started punching Castine in the head with his fists. Castine was carrying a bullhorn which was at his side when he went around the car and she did not see him swing it at Stephens. Castine did not strike back at Stephens and tried to block the punches. He ran into a concrete pillar and fell to the ground. When the other picketers ran over to Castine, she asked Stephens why he had run into Castine, he denied doing so and called her several offensive names. Pullen said that when Castine went around the car she could not see if he did anything to it but heard a sound and sensed that he had done something. In a statement she gave to the police a few days after the incident she said that Castine made a "weak" kicking

motion towards the side of the car but at the hearing she said she could not recall if he did.

Matthew Kind is the general manager of the Detroit Club which borders on the alley by The Free Press building. He observed the incident from a window overlooking the alley. He saw a car inching towards the picketers who were standing around it. The driver honked his horn but he could not get by and stopped. He saw a picketer with a bullhorn come around the car and make a kicking motion. The driver got out and looked at the side of the car. He and the picketer got into an argument, the driver struck the picketer one time with his hand, and he fell down. The picketer had the bullhorn in front of him and the driver, but he did not see him swing at him. He said that the car did not hit any of the picketers and the closest it came to the picketer with the bullhorn was a foot.

Taylor testified that he investigated the incident by talking to Stephens and 3 people at the Detroit Club who had witnessed it. Stephens told him that Castine stood in front of him and had kicked the side of his vehicle. An argument ensued and Stephens struck Castine in self-defense after Castine came towards him with a megaphone in his hand. The people at the Detroit Club supported Stephens' version of what happened. He gave the information he had obtained to Kelleher and John Anthony, Stephens' supervisor. Kelleher testified that he made the decision to discipline Stephens. He was informed about the incident when it happened and he had discussed it with Anthony and with Taylor. He also read a written report and the statements of the employees of the Detroit Club who had seen the incident. He concluded that Castine had blocked Stephens' vehicle as he attempted to leave the alley, that Castine had kicked the side of Stephens' vehicle, and that Stephens had acted in self-defense when he struck Castine. He said that although he felt that Castine was

the aggressor, he also felt that Stephens could have avoided the incident by not getting out of his car. He felt that a 2-day suspension was appropriate to send a message that he should have been more levelheaded and not have gotten out of the car and spoken to Castine.

Analysis and Conclusions

There is some conflicting evidence as to what occurred during this incident but since one of the two principal participants, Castine, did not testify, for reasons that have not been explained, it is impossible to know for certain what actually happened.[128] While I do not doubt that Pullen attempted to testify truthfully, she did not have clear view of what transpired when Stephens got out of the car and confronted Castine. Based on the credible and consistent testimony of Stephens and Kind, a disinterested party, I find that Stephens' vehicle did not hit Castine and that Stephens did not thereafter repeatedly strike Castine with his fists, as Pullen claimed. There was nothing in Stephens' demeanor while testifying to indicate that he was not telling the truth, notwithstanding, the self-serving nature of his testimony. Most of his testimony was corroborated by Kind and to an extent by Pullen. I find that the General Counsel has failed to establish by a preponderance of the evidence that Stephens hit Castine with his vehicle, that Castine did not provoke the entire incident by kicking or striking Stephens' vehicle, or that Stephens was not acting in self-defense when he punched Castine, who had come at him with a large bullhorn in his

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[128] According to Pullen, Emily Everett, an alleged discriminatee in this proceeding, was one of the picketers who was present at the incident. Everett appeared as a witness and testified about several incidents but was not asked about this one.

hand. More important, the evidence fails to establish that the Respondent failed to make a reasonable investigation of the incident, that its conclusions that Castine was the aggressor and Stephens was acting in self-defense were not made in good faith or were not supported by the evidence it had available to it, or that it used a double standard in disciplining Stephens. I find that based on the information that was available, Kelleher's determination that Stephens acted in self-defense in striking Castine was not unreasonable and that his failure to discharge Stephens did not constitute disparate treatment.

26. Incidents Involving Alleged Thefts

On October 2, 1995, DNA employee, Isaac Ross was discharged for stealing food from the cafeteria. The Personnel Action Report documenting Ross' discharge states that he had been caught stealing food several times previously. Home Delivery Operations Manager Pierre Savoie credibly testified that this was incorrect and that, while Ross had been accused of stealing food before, there was insufficient evidence to establish that he had actually done so. After Ross was found with a sandwich stuffed in his pants, Savoie interviewed Ross. He did not believe Ross' denial, concluded that Ross had stolen the sandwich, and terminated him.

On November 1, 1996, DNA employee Willie Arrington was discharged for stealing 4 tires. The evidence shows that in August 1996, 4 tires were taken from the tire shop at the North Plant. Thereafter, a similar set of tires was seen on Arrington's personal vehicle. After first saying that he had purchased the tires and furnishing a bogus receipt, Arrington admitted that he had stolen the tires. In October, he was suspended pending investigation, and was subsequently terminated. James Barnett, director of human resources at the

North Plant reviewed the results of the investigation of the tire theft and concluded that Arrington should be discharged. Barnett testified that he would have given Arrington the opportunity to resign before terminating him, but that Arrington was not at work and Barnett was unable to reach him.

On January 27, 1998, DNA employee Murray Loeffler was given a written warning for improperly handling extra advertising products. Loeffler was assigned to deliver advertising inserts to a number of residences. Division Sales Manager William Brisse found 75 of the inserts in a trash dumpster. He investigated and ascertained that Loeffler had delivered the inserts as he had been instructed but had thrown the extras in the dumpster. The correct procedure required that Loeffler return the extra inserts so that they could be counted and sent back to the North Plant as scrap. Brisse said he did not regard Loeffler's actions as stealing.

Analysis and Conclusions

I find that none of these incidents constitutes evidence of disparate treatment. They do not have any direct relationship to the strike or involve situations or actions that are even remotely similar to that for which any alleged discriminatee in this matter was terminated. It is apparently being argued that, because the 2 employees discharged for theft were given an opportunity to explain their actions and one of them might have been allowed to resign rather than being discharged, if the Respondent had been able to contact him, they were treated more leniently than strikers who were discharged. I do not agree. Both were terminated, once the Respondent had reason to believe they did in fact commit the thefts of which they were accused. I have found that under the circumstances of this case the fact that striking employees who were accused

of misconduct were not contacted and asked for their side of the story does not constitute evidence of disparate treatment. As for Loeffler, his actions did not amount to theft, they were not comparable to that for which any striker was discharged, and could not be considered to constitute serious misconduct under the *Clear Pine Mouldings* standard.

27. Violations of Gate Procedures

On September 13, 1995, the Macomb County Circuit Court issued an injunction against the striking Unions limiting the number of picketers permitted at the South gate of the North Plant and proscribing their conduct. The injunction provides, inter alia, that when alerted by a horn blast or flashing headlights, picketers must immediately move aside and allow the vehicle to enter. Thereafter, the DNA issued rules concerning the procedures to be followed when entering and exiting the facility. These rules included the requirement that the drivers sound their horns and flash their headlights at all times regardless of whether there were any picketers present. At the hearing, counsel for the General Counsel introduced into evidence a summary of certain of the DNA's records concerning employees who were cited for in some manner failing to comply these rules in 1996 and 1997.[129] It

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[129] The copy of Exh. GC-216 that I received from the reporting company is not in the form that was admitted into evidence. Specifically, I sustained the Respondent's objection to the reference to the Macomb County Court injunction in the title of the summary, since none of the underlying documents referred to that injunction. Moreover, it is clear that the mandatory language of the injunction applied only to picketers not to those crossing the picket line. I also sustained the objection to the footnotes in the summary, which purport to describe only some of the alleged violations, because of the selectivity of their inclusion. I have considered only the portion

is not clear what disciplinary action was taken against the employees who failed to comply with the gate procedures, but no one was discharged by the Respondent for that reason.

Analysis and Conclusions

With the exception of the violations of gate procedures committed by Lowell Yancy, discussed below, there is no evidence in the record indicating how any employee failed to comply with those procedures. Consequently, there is no way of knowing whether any of the violations involved misconduct of a serious nature or was comparable to that for which any striker was discharged. I find that this summary fails to establish any disparate treatment by the Respondent.

28. Incidents Involving Lowell Yancy

Counsel for the General Counsel introduced documents indicating that DNA employee Lowell Yancy was given a 2-day suspension for unprofessional behavior towards security personnel and failing to follow company policy concerning ingress and egress on December 4, 1996. He was given a written warning for the same reasons for an incident which occurred on January 23, 1997.[130] Neither Yancy nor any of the security personnel involved in these incidents were called as witnesses at the hearing. North Plant Building Manager Willie Killebrew credibly testified that, on December 4, he was told by Security that when Yancy drove onto the property he had a visitor in his car who did not have an ID. Security

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of the exhibit that were admitted in evidence.

[130] Although the warning states that the incident occurred on January 23, 1996, it is clear that this is a typographical error.

asked him to pull over so the visitor could be signed in, but Yancy drove forward without stopping. Yancy was given a 2-day suspension for failing to follow regulations concerning visitors entering DNA property. On January 23, 1997, Yancy failed to follow the procedures for entering the property, which required him to stop and allow picketers to move off the drive way, and he was verbally abusive to the security guards. For this he was given a written warning.

Analysis and Conclusions

I find that the limited evidence about these incidents fails to establish any disparate treatment. The first incident had nothing to do with the strike and did not involve any conduct similar to that for which any striker was disciplined. The second incident did involve a violation of the Respondent's rules concerning vehicles crossing the picket line at the entrance to the North Plant. However, there are few details concerning the incident in this record and it is unclear whether there were even any picketers present when the incident occurred. There is no evidence that anyone was intimidated or endangered by his actions. I find that counsel for the General Counsel have failed to establish that the Respondent treated Yancy leniently because he did not participate in the strike, that his conduct was similar to that of any striker who was disciplined, or that it used a double standard in disciplining him.

29. Incident Involving Zoroya Zuazo

Counsel for the General Counsel introduced records showing that, on March 14, 1996, DNA employee Zoroya Zuazo and coworker Richard Snead got into an argument at the North Plant when Snead criticized Zuazo for conversing with a maintenance worker and neglecting her inserting

machine. Snead alleged that Zuazo told him to shut up or the maintenance worker would kick his "ass." At lunchtime the same day, while they were at a bank cashing their paychecks, the argument between Zuazo and Snead continued to the extent that the police were called.

Neither Zuazo nor Snead was called as a witness. Supervisor Mike Martin credibly testified that Zuazo denied threatening Snead and that he was unable to make a determination that she had. He suspended Zuazo not for making a threat but based on the fact that she failed to return to her job after lunch that day and her overall record of absenteeism, tardiness, and causing disruptions on the work floor.

Analysis and Conclusions

I assume that this evidence is alleged to establish that Zuazo made a threat to have someone kick Snead's "ass" and that she was not discharged as a result. The evidence fails to establish that the Respondent had a reasonably-based belief that Zuazo had actually made such a threat or that this incident had any relationship to the strike. I find that there is no evidence of disparate treatment here.

Conclusions of Law

1. The Respondents, Detroit Newspaper Agency, d/b/a Detroit Newspapers, The Detroit News, and The Detroit Free Press are each employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Each of the Charging Unions is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent, Detroit Newspaper Agency, d/b/a Detroit Newspapers, violated Section 8(a)(3) and (1) of the Act by discharging Gordon Adams, Glenn Anderson, Richard Andrews, Derrick Bell, Michael Burke, Frank Ciaramitaro, James Cichy, Lawrence Croxon, James Daniels, Ronald DeLaura, Floyd Davis, Jr., Delford Earnest, Anthony Edwards, Shawn Ellis, Michael Evich, Michael Fahoome, Melanie Francis, John Gerhardt, Gabriel Glowacki, Robert Heckart, Jack Howe, Randy Karpinen, Walter Macelt, Douglas McPhail, David Mills, Steve Montagne, Michael Nippa, Shelby Perkins, Jerome Robertson, Dennis Romanowski, Randall Runevitch, Gary Rusnell, Gary Ryan, Juan Sanchez, Jess Saxton, Larry Skewarczynski, Henry Thompson, Rick Torres, Melvin Townsend, Scott Uhazie, Diane Valko, Alex Young, and Michael Youngmeier because of their membership in or activities on behalf of a labor organization.

4. The Respondent, The Detroit News, violated Section 8(a)(3) and (1) of the Act by discharging Rebecca Cook, Marcus Franklin, Francis Hopkins, and Scott Martelle because of their membership in or activities on behalf of a labor organization.

5. The Respondent, The Detroit Free Press, violated Section 8(a)(3) and (1) of the Act by discharging Chris Manoleas, Margaret Trimer-Hartley, and Susan Watson because of their membership in or activities on behalf of a labor organization.

6. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondents have engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondents having discriminatorily discharged employees who are unfair labor practice strikers, they must offer them immediate reinstatement and make them whole for any loss of earnings and other benefits from date of discharge to date of proper offer of reinstatement, *Abilities & Goodwill, Inc.*, 241 NLRB 27 (1979), less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER[131]

The Respondents, Detroit Newspaper Agency, d/b/a Detroit Newspapers, The Detroit News, and The Detroit Free Press, their officers, agents, successors, and assigns, shall

1. Cease and desist from

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[131] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Discouraging their employees' activity on behalf of a labor organization by discharging striking employees, without an honest belief that they had engaged in serious misconduct, or where they had not engaged in serious misconduct.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, the Respondent, Detroit Newspaper Agency, d/b/a Detroit Newspapers, shall offer to Gordon Adams, Glenn Anderson, Richard Andrews, Derrick Bell, Michael Burke, Frank Ciaramitaro, James Cichy, Lawrence Croxon, James Daniels, Ronald DeLaura, Floyd Davis, Jr., Delford Earnest, Anthony Edwards, Shawn Ellis, Michael Evich, Michael Fahoome, Melanie Francis, John Gerhardt, Gabriel Glowacki, Robert Heckart, Jack Howe, Randy Karpinen, Walter Macelt, Douglas McPhail, David Mills, Steve Montagne, Michael Nippa, Shelby Perkins, Jerome Robertson, Dennis Romanowski, Randall Runevitch, Gary Rusnell, Gary Ryan, Juan Sanchez, Jess Saxton, Larry Skewarczynski, Henry Thompson, Rick Torres, Melvin Townsend, Scott Uhazie, Diane Valko, Alex Young, and Michael Youngmeier; the Respondent, The Detroit News, shall offer to Rebecca Cook, Marcus Franklin, Francis Hopkins, and Scott Martelle; and the Respondent, The Detroit Free Press, shall offer to Chris Manoleas, Margaret Trimer-Hartley, and Susan Watson, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) The Respondent, Detroit Newspaper Agency, d/b/a Detroit Newspapers, shall make Gordon Adams, Glenn Anderson, Richard Andrews, Derrick Bell, Michael Burke, Frank Ciaramitaro, James Cichy, Lawrence Croxon, James Daniels, Ronald DeLaura, Floyd Davis, Jr., Delford Earnest, Anthony Edwards, Shawn Ellis, Michael Evich, Michael Fahoome, Melanie Francis, John Gerhardt, Gabriel Glowacki, Robert Heckart, Jack Howe, Randy Karpinen, Walter Macelt, Douglas McPhail, David Mills, Steve Montagne, Michael Nippa, Shelby Perkins, Jerome Robertson, Dennis Romanowski, Randall Runevitch, Gary Rusnell, Gary Ryan, Juan Sanchez, Jess Saxton, Larry Skewarczynski, Henry Thompson, Rick Torres, Melvin Townsend, Scott Uhazie, Diane Valko, Alex Young, and Michael Youngmeier; the Respondent, The Detroit News, shall make Rebecca Cook, Marcus Franklin, Francis Hopkins, and Scott Martelle; and the Respondent, The Detroit Free Press, shall make Chris Manoleas, Margaret Trimer-Hartley, and Susan Watson, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, the Respondents shall remove from their files any reference to these unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored

in elrctronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, each Respondent shall post at each of its facilities in the State of Michigan, copies of the appropriate attached notice which relates to it, marked "Appendix A, B, or C,"[132]. Copies of the appropriate notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, any Respondent has gone out of business or closed the facility involved in these proceedings, that Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 31, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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[132] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS FURTHER ORDERED that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found herein.

Dated, Washington, D.C. December 17, 1999

APPENDIX A

NOTICE TO EMPLOYEES
Posted by Order of the National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage our employees' activity on behalf of a labor organization by discharging striking employees, absent an honest belief that they had engaged in serious misconduct, or where they had not engaged in serious misconduct.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Gordon Adams, Glenn Anderson, Richard Andrews, Derrick Bell, Michael Burke, Frank Ciaramitaro, James Cichy, Lawrence Croxon, James Daniels, Ronald DeLaura, Floyd Davis, Jr., Delford Earnest, Anthony Edwards, Shawn Ellis, Michael Evich, Michael Fahoome, Melanie Francis, John Gerhardt, Gabriel Glowacki, Robert Heckart, Jack Howe, Randy Karpinen, Walter Macelt,

Douglas McPhail, David Mills, Steve Montagne, Michael Nippa, Shelby Perkins, Jerome Robertson, Dennis Romanowski, Randall Runevitch, Gary Rusnell, Gary Ryan, Juan Sanchez, Jess Saxton, Larry Skewarczynski, Henry Thompson, Rick Torres, Melvin Townsend, Scott Uhazie, Diane Valko, Alex Young, and Michael Youngmeier full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Gordon Adams, Glenn Anderson, Richard Andrews, Derrick Bell, Michael Burke, Frank Ciaramitaro, James Cichy, Lawrence Croxon, James Daniels, Ronald DeLaura, Floyd Davis, Jr., Delford Earnest, Anthony Edwards, Shawn Ellis, Michael Evich, Michael Fahoome, Melanie Francis, John Gerhardt, Gabriel Glowacki, Robert Heckart, Jack Howe, Randy Karpinen, Walter Macelt, Douglas McPhail, David Mills, Steve Montagne, Michael Nippa, Shelby Perkins, Jerome Robertson, Dennis Romanowski, Randall Runevitch, Gary Rusnell, Gary Ryan, Juan Sanchez, Jess Saxton, Larry Skewarczynski, Henry Thompson, Rick Torres, Melvin Townsend, Scott Uhazie, Diane Valko, Alex Young, and Michael Youngmeier whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Gordon Adams, Glenn Anderson, Richard Andrews, Derrick Bell, Michael Burke, Frank Ciaramitaro, James Cichy, Lawrence Croxon, James Daniels, Ronald DeLaura, Floyd Davis, Jr., Delford Earnest, Anthony Edwards, Shawn Ellis, Michael Evich, Michael Fahoome, Melanie Francis, John Gerhardt, Gabriel Glowacki, Robert

Heckart, Jack Howe, Randy Karpinen, Walter Macelt, Douglas McPhail, David Mills, Steve Montagne, Michael Nippa, Shelby Perkins, Jerome Robertson, Dennis Romanowski, Randall Runevitch, Gary Rusnell, Gary Ryan, Juan Sanchez, Jess Saxton, Larry Skewarczynski, Henry Thompson, Rick Torres, Melvin Townsend, Scott Uhazie, Diane Valko, Alex Young, and Michael Youngmeier and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

DETROIT NEWSPAPER AGENCY,
d/b/a DETROIT NEWSPAPERS
(Employer)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226-2569, Telephone 313-226-3244.

APPENDIX B

NOTICE TO EMPLOYEES
Posted by Order of the National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage our employees' activity on behalf of a labor organization by discharging striking employees, absent an honest belief that they had engaged in serious misconduct, or where they had not engaged in serious misconduct.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Rebecca Cook, Marcus Franklin, Francis Hopkins, and Scott Martelle full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Rebecca Cook, Marcus Franklin, Francis Hopkins, and Scott Martelle whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Rebecca Cook, Marcus Franklin, Francis

Hopkins, and Scott Martelle and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

THE DETROIT NEWS
(Employer)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226-2569, Telephone 313-226-3244.

APPENDIX C

NOTICE TO EMPLOYEES
Posted by Order of the National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage our employees' activity on behalf of a labor organization by discharging striking employees, absent an honest belief that they had engaged in serious misconduct, or where they had not engaged in serious misconduct.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Chris Manoleas, Margaret Trimer-Hartley, and Susan Watson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Chris Manoleas, Margaret Trimer-Hartley, and Susan Watson whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Chris Manoleas, Margaret Trimer-Hartley, and

Susan Watson and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

THE DETROIT FREE PRESS
(Employer)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226-2569, Telephone 313-226-3244.

Supreme Court, U.S.
FILED
AUG 9 - 2006
OFFICE OF THE CLERK

No. 05-1427

In the Supreme Court of the United States

DETROIT NEWSPAPER AGENCY, DBA DETROIT NEWSPAPERS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supported the National Labor Relations Board's finding that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging three economic strikers.

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In the Supreme Court of the United States

No. 05-1427

DETROIT NEWSPAPER AGENCY, DBA DETROIT NEWSPAPERS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD BOARD IN OPPOSITION

OPINIONS BELOW

The per curiam judgment of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter*, but is *reprinted in* 171 Fed. Appx. 352. The decision and order of the National Labor Relations Board (Pet. App. 14a-359a) is reported at 342 N.L.R.B. No. 24. The Board's order granting reconsideration (Pet. App. 4a-13a) is reported at 343 N.L.R.B. No. 113.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 2006. The petition for a writ of certiorari

was filed on May 5, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(a)(1) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(1), makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, 29 U.S.C. 157, including the right to join and assist labor organizations. In *NLRB* v. *Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964), the Court held that an employer violates Section 8(a)(1) by discharging an employee when "it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct." Even if an employer has a good faith belief that strikers engaged in serious misconduct, discharge of those strikers is unlawful if the misconduct did not in fact occur. See *ibid.*

Under those principles, an employer violates the Act by discharging economic strikers for alleged serious strike misconduct which did not occur. In deciding whether economic strikers have engaged in serious misconduct for which they can be discharged, the National Labor Relations Board (Board) determines "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected by the Act." *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044, 1046 (1984) (quoting *NLRB* v. *W.C. McQuaide, Inc.*, 552 F.2d 519, 528 (3d Cir. 1977)), enforced, 765 F.2d 148 (9th Cir. 1985) (Table), cert. denied, 474 U.S. 1105 (1986).

2. a. Petitioner is a joint operating partnership of two newspapers, the Detroit News and the Detroit Free Press. Pet. App. 32a. Petitioner performs the newspapers' noneditorial functions, including printing, distribution, sale of advertising, and promotion. *Id.* at 34a. Petitioner's main office is located in the Detroit News building on West Lafayette Boulevard, in Detroit, Michigan. *Ibid.* Petitioner also operates several distribution centers throughout Detroit and suburban areas. *Ibid.*

After their collective-bargaining agreements expired in April 1995, six unions, representing various groups of employees, struck petitioner and the two newspapers in July 1995, and over 2000 employees went out on strike. Pet. App. 35a. On July 24, 1996, during the strike, the Board, pursuant to the terms of a settlement agreement with the striking unions, issued an order requiring the unions to cease and desist from, among other things, blocking or otherwise coercively interfering with ingress or egress at petitioner's places of business. *Id.* at 41a. As part of the settlement agreement, the unions consented to entry of a court order enforcing the terms of the settlement agreement. *NLRB* v. *Teamsters Local No. 372*, 95 F.3d 1153 (6th Cir. 1996) (Table), supplemented, 234 F.3d 1269 (6th Cir. 1998) (Table) and 209 F.3d 936 (6th Cir. 2000). Accordingly, the Board applied for, and the Sixth Circuit granted, enforcement of the Board's order. *Ibid.*

The strike ended over a year and a half after it began when, in February 1997, the unions made unconditional offers to return to work on behalf of the striking employees. Pet. App. 35a. During the strike, petitioner discharged many striking employees, including Douglas McPhail, Mike Youngmeier, and Gary Rusnell, claiming that they had engaged in strike misconduct. *Id.* at 2a,

31a-32a. The facts concerning the discharge of those three strikers are set forth below.

2. a. *Picketing at the Hayes Street Distribution Center.* On August 29, 1996, a group of 40 to 50 union officials and striking employees, including McPhail and Youngmeier, picketed at petitioner's Hayes Street Distribution Center in Roseville, Michigan. Pet. App. 251a. The picketers, some carrying picket signs, walked in a circle along the public access on Hayes Street in front of a wide driveway leading to petitioner's facility. Prior to the picketing, a union official instructed the strikers not to block any entrances to petitioner's property and reaffirmed for them the unions' goal of legal, peaceful picketing that day. *Id.* at 257a. Another union representative directed the strikers not to block the driveway and to keep moving in a circle. *Id.* at 256a.

Upon the picketers' arrival, petitioner immediately summoned the local Roseville police department to the Hayes facility. Pet. App. 254a, 257a-258a. About 20 police officers, including Deputy Chief Richard Heinz, quickly arrived at the Hayes facility. *Id.* at 257a-258a, 264a. Heinz, immediately taking charge of the scene, established traffic procedures to accommodate the separate interests of the picketers and petitioner. *Id.* at 256a-258a, 262a.

Heinz instructed the picketers, the unions, and petitioner that his officers would direct the traffic in and out of the facility by lining up vehicles in a turn-around lane and bringing them through the picket line in groups. Pet. App. 255a-258a, 262a-264a. After five or six vehicles had assembled, the officers informed the picketers that the waiting vehicles were about to enter. *Id.* at 258a. When the officers approached the picket line, the line opened, the picketers stood back, and the vehicles

entered the driveway in a group without incident. *Id.* at 257a-258a, 262a. Following those procedures, several groups of vehicles entered the Hayes facility during the picketing. *Id.* at 257a-264a. Similarly, if a vehicle wanted to exit, the police notified the picketers, who stepped aside and waited for the exiting vehicle to leave the property. *Id.* at 257a, 260a-262a.

Petitioner discharged 22 employees, including McPhail and Youngmeier, for participating in this picketing. Pet. App. 251a.[1] In identical letters dated September 18, 1996, petitioner stated that McPhail and Youngmeier had "physically blocked ingress and egress of traffic" to the Hayes facility. *Id.* at 251a-252a.

b. *Labor Day Rally at the Detroit News Building.* On Friday, August 30, 1996, many strikers, including Gary Rusnell, and their supporters participated in a Labor Day rally in front of the Detroit News building to bring public attention to the strike. Pet. App. 268a. The unions notified the police of the planned rally beforehand, and there was a large police presence throughout the three-hour rally. Petitioner openly videotaped most of the rally, during which several prominent national labor leaders, local union officials, political leaders, and dignitaries took turns speaking to an audience of up to 300. *Ibid.*[2] No violence, or threat of violence, occurred. *Id.* at 269a, 272a-274a.

The speakers used a microphone and podium situated on the stoop area in front of the doors leading to

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[1] Only the findings pertaining to the discharges of McPhail and Youngmeier were challenged before the Board. Pet. App. 17a.

[2] The list of speakers included AFL-CIO President John Sweeney, AFL-CIO Secretary-Treasurer Richard Trumpka, Congressman John Conyers, Bishop Thomas Gumbleton, and Detroit City Council Member Mary Ann Mahaffey. Pet. App. 268a.

the lobby of the Detroit News building. Pet. App. 268a. Those doors were accessible by the two front steps and two side ramps. *Ibid.* In the opening hour of the rally, the front doors were open and operational. *Id.* at 273a. One hour into the rally, police ordered petitioner to lock the front doors, following a procedure similar to that implemented at dozens of demonstrations at the building during the strike. *Ibid.* As directed, petitioner locked the front doors and barricaded them from the inside so that no one used them to enter or leave the building for the next two hours while the rally was in progress. *Ibid.* Petitioner did not object or claim that its business was being disrupted. *Id.* at 275a. Police officers directed people to use a side entrance to the building during the rally. *Id.* at 273a. That entrance remained open and available to the public throughout the entire rally. *Id.* at 275a-276a & n.110.

After two hours of speeches, the speakers sat down on the steps for an orchestrated photo-opportunity to publicize the strikers' cause. Pet. App. 268a-278a. Some strikers, including Rusnell, sat down on the steps and stoop, while other strikers remained standing nearby. *Id.* at 274a-275a. As pre-arranged by the rally organizers, the police stepped forward and arrested individuals who were sitting down. *Id.* at 274a-277a.

Petitioner discharged Rusnell and seven other strikers who sat down on the steps at the end of the rally. Pet. App. 269a-271a.[3] Petitioner's letter to Rusnell informed him that he was discharged for blocking ingress and egress to the front entrance of the Detroit News building. *Id.* at 269a.

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[3] Only the findings pertaining to the discharge of Rusnell were challenged before the Board. Pet. App. 17a.

3. Based on charges filed by the unions alleging unlawful discharges at those and other union events, the Board's General Counsel issued unfair labor practice complaints alleging that petitioner had unlawfully discharged 96 employees, including McPhail, Youngmeier, and Rusnell, because they had engaged in protected concerted activity. Pet. 5; Pet. App. 31a-32a. The parties settled many of the individual cases and the Board adjudicated the rest, ruling in petitioner's favor on some and against petitioner on others. *Id.* at 14a-369a.

The administrative law judge (ALJ) found that petitioner had unlawfully discharged McPhail, Youngmeier, and Rusnell. With respect to strikers McPhail and Youngmeier, the ALJ based his findings on a videotape of the picketing and the largely credited testimony of the senior police officer and union officials. The ALJ concluded that the picketers at the Hayes Street Distribution Center did not engage in serious misconduct that would justify their discharge. Pet. App. 258a. He found that petitioner called the police immediately after the picketers arrived and that there was no evidence that, prior to the arrival of the police, "there had been any violence or that [the pickets] had actually prevented anyone from entering or leaving." *Id.* at 259a.[4] The ALJ also found that, during the picketing, there was "no violence or threatening conduct by the pickets and * * * nothing that indicates that there was a likelihood

[4] Petitioner asserts (Pet. 6) that a large cement block in the driveway prevented entrance to the facility. The ALJ found, however, that there was no evidence that any of the discharged employees was responsible for that block, and that it was clear from the videotapes that the block did not affect the ability of vehicles to enter or leave the facility. Pet. App. 259a n.101.

of violence." *Id.* at 261a. Further, he observed that as a "practical matter, once the police arrived and took control of the scene, all parties were subject to their control and direction" (*id.* at 259a), and that when the police moved cars through the entrance, the pickets moved out of the way and vehicles exited without difficulty (*id.* at 262a).

The ALJ concluded that, while as a result of the procedures set up by the police some of those seeking to enter the facility may have been delayed in doing so, that fact did "not establish that the pickets blocked ingress or egress to the facility" or "convert peaceful and lawful picketing into serious misconduct." Pet. App. 259-260a. Rather, "throughout the picketing the pickets were engaged in the kind of 'peaceful patrolling' that is protected by the Act." *Id.* at 261a (citing *Clear Pine Mouldings*, 268 N.L.R.B. at 1047).

The ALJ also found that petitioner unlawfully discharged striker Rusnell for his conduct during the Labor Day rally. Pet. App. 278a. The ALJ observed that petitioner claimed that the discharges were for "blocking ingress and egress by sitting down on the steps and stoop" at the end of the rally and that it "did not discharge anyone for attending the rally" or demonstrating outside the building. *Id.* at 270a-271a, 277a. The ALJ, however, concluded that the strikers' actions in sitting down on the steps and stoop at the end of the rally did not constitute serious misconduct under *Clear Pine Mouldings*. *Id.* at 276a. The ALJ determined that the rally was intended to build support for the strikers rather than to block access to the building; that the police directed petitioner to lock its doors long before the sit-down at the end of the rally, and petitioner did not object; and that, as the rally ended, individuals briefly

sat in front of a door that had been locked for two hours and that the police had not let anyone use during that period. *Id.* at 276a-278a. The ALJ observed that, "[w]hatever disruption to [petitioner's] business that occurred that day had been going on without objection by [petitioner] for almost 2 hours before anyone sat down on the steps." *Id.* at 277a. The ALJ concluded that, in those circumstances, there was no evidence that any of the employees had prevented anyone from entering or leaving the building or that their sitdown could reasonably be said to have coerced or intimidated nonstriking employees. *Id.* at 278a.

4. The Board adopted the ALJ's findings that McPhail, Youngmeier, and Rusnell had not engaged in serious misconduct. Pet. App. 16a-18a. The Board held that the discharges violated Section 8(a)(1), under *NLRB* v. *Burnup & Sims*, *supra*, because the employees had not engaged in misconduct in the course of their protected strike activity.[5]

5. The court of appeals affirmed the Board's findings that McPhail, Youngmeier, and Rusnell had not engaged in misconduct, and enforced the Board's order requiring their reinstatement with backpay. Pet. App. 1a-3a. In a per curiam opinion, the court found that the "Board's findings are supported by the testimony of multiple witnesses, as well as by other direct evidence." *Id.* at 2a. The court further stated:

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[5] The Board found it unnecessary to decide whether the discharges also violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), which prohibits discrimination in regard to tenure of employment to encourage or discourage union support, and therefore did not adopt the judge's finding that the discharges also violated Section 8(a)(3). Pet. App. 17a n.5.

> Although [petitioner] argues the Board applied an incorrect legal standard under which it evaluated the success, not the coercive tendency, of the employees' activities and used police intervention to "excuse[]" employees' misconduct, the Administrative Law Judge's decision, which the Board adopted, properly identified and applied the test set forth in *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044 (1984). *See also Va. Holding Corp.*, 293 N.L.R.B. 182, 217 (1989) (employees' participation in picket disrupting traffic not "of itself particularly serious misconduct").

Ibid.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. This Court's review is therefore not warranted.

1. The court of appeals correctly held that the Board "properly identified and applied the test set forth in *Clear Pine Mouldings*" in finding that McPhail, Youngmeier, and Rusnell had not engaged in serious strike misconduct. Pet. App. 2a. Under *Clear Pine Mouldings*, in deciding whether a striker engaged in sufficiently serious strike misconduct to justify his discharge, the Board determines whether, "under the circumstances existing, [the misconduct] may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Clear Pine Mouldings*, 268 N.L.R.B. at 1046-1047 (quoting *W.C. McQuaide,*

Inc., 552 F.2d at 528).[6] That test applies, *inter alia*, when an employer claims to have discharged a striker for blocking access to its facility. See *F.E. Wray, Inc.*, 283 N.L.R.B. 771, 772 (1987) (parking truck across employer's driveway, thereby impeding access, not shown to constitute significant interference with employer's business); *CalMat Co.*, 326 N.L.R.B. 130, 135 (1998) (employer justified in discharging employee who, after all other pickets had moved aside, intentionally stood in front of truck that had been signaled to proceed through gate). See generally *Virginia Holding Corp.*, 293 N.L.R.B. 182, 217 (1989) ("Disruption of ingress and egress of vehicles is often associated with picketing and is the type of thing to be expected. When a strike occurs, there necessarily and commonly will be some disruptions. The question is whether the acts of disruption are so serious as to deny one continued employment.").

Petitioner argues (Pet. 10) that the Board's conclusion "was based in part on the finding that there was no evidence * * * that the blocking activities of striking employees actually prevented anyone from entering or leaving the Hayes and Detroit News facilities," and that the court of appeals and the Board therefore ignored well-established law that "striker misconduct should not be evaluated by its success." None of the cases on which petitioner relies (Pet. 10-12), however, holds that the Board is barred from considering the fact that no one was denied ingress or egress as a result of peaceful picketing when assessing whether, under all the relevant circumstances, the conduct had a reasonable tendency to coerce nonstrikers.

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[6] An analogous standard applies to coercion of persons who are not protected by the Act. *Clear Pine Mouldings*, 268 N.L.R.B. at 1046 n.14.

In *Newport News Shipbuilding & Dry Dock Co.* v. *NLRB*, 738 F.2d 1404 (1984), the Fourth Circuit did not address whether lack of success was relevant, but, rather, whether the striker's limited conduct—putting one nail on a driveway at a time when other nails were on the same ground—warranted the striker's discharge. The court found that the use of nails was a prevalent tactic throughout the strike and had caused serious problems for nonstriking employees reporting to work, and that the striker therefore was acting as part of a "premeditated effort to intimidate strike breakers." *Id.* at 1410-1411. Nor is this case like *NLRB* v. *United Mine Workers*, 429 F.2d 141 (3d Cir. 1970), which addressed circumstances in which 400-500 miners had formed a hostile crowd to prevent a rival union from meeting, and three miners had seized and struck the president of the rival union. In that context, the court observed that it need not be shown that pickets had achieved the intended result of preventing the rival union from meeting. *Id.* at 146. Similarly inapposite is *Pullman Inc.* v. *NLRB*, 407 F.2d 1006 (5th Cir. 1969), which did not involve picketing or blocking access, but instead addressed whether strikers who were present during a fight but who did not "actually thr[o]w a blow" had engaged in improper misconduct. *Id.* at 1018 n.7.

Nor is the Board's decision here inconsistent with the Board precedent that petitioner cites. Pet. 11. The conduct at issue in those cases plainly had a tendency to coerce the employees affected by it. See *Metal Polishers Int'l Union, Local No. 67*, 200 N.L.R.B. 335, 336 (1972) (union agents and picketers on several occasions actually prevented entrance by standing in front of cars of employees and employer managers); *Service Employees Int'l Union, Local 525*, 329 N.L.R.B. 638, 684-685

(1999) (on one day, pickets paraded in pairs across the entrance to a parking garage, purposely keeping many cars from entering, and then parked a vehicle across the entrance totally preventing access to the facility, and on another day, handcuffed themselves to the front doors of the building at lunchtime, "again impeding ingress and egress"), enforced, 52 Fed. Appx. 357 (9th Cir. 2002) (mem.). Neither the picketing at the Hayes facility nor the rally at the Detroit News building involved similarly confrontational conduct that itself had a tendency to coerce employees seeking access to the premises.[7]

2. Petitioner also contends (Pet. 13-14), with respect to the discharges of McPhail and Youngmeier, that the Board applied an incorrect legal standard by permitting police intervention to excuse striker misconduct at the Hayes Distribution Center. Petitioner's argument lacks merit and does not warrant review.

Petitioner bases its argument on two inapposite cases, *Newport News*, 738 F.2d at 1411-1412, and *Local 1150, United Electrical Workers*, 84 N.L.R.B. 972, 975 (1949). In both of those cases, the police intervened to

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[7] This case is also wholly dissimilar from *Local 1150, United Electrical Workers*, 84 N.L.R.B. 972, 975 (1949), see Pet. 12, where as many as 80 to 100 or more picketers patrolled in front of the plant so as to block the employees' main entrance, a door only 6 feet wide. The picketing was accompanied by assaults of a supervisor, in the presence of rank and file employees, and of a nonstriking employee as she left the plant, as well as threats of reprisal against a nonstriking employee and a supervisor. Petitioner also errs in relying (Pet. 10) on *Hughes* v. *Superior Court*, 339 U.S. 460, 466 (1950), where the Court observed that picketing may be unlawful if conducted "in numbers that of themselves carry a threat of violence." There is no claim that the picketing at the Hayes facility or the sit down at the end of the Labor Day rally were of that magnitude.

facilitate entry into the plant in the face of striker misconduct.

In *Newport News*, the discharged employee blocked a nonstriking employee, swore at him, and continually moved in front of him as he attempted to walk around the striker. The striker did not "voluntarily allow[] the nonstriker to pass," and only the intervention of a police officer permitted the nonstriker to enter the facility. 738 F.2d at 1410-1411. The Fourth Circuit concluded that such intentional obstruction demonstrated an "intent to intimidate or coerce," which was not negated by the police action. *Id.* at 1411.

In *Local 1150, United Electrical Workers*, the Board concluded that the manner of the picketing (which involved mass picketing in front of a narrow entrance), coupled with the existence of assaults and threats, "was calculated to bar and necessarily resulted in barring employees' ingress and egress at the plant." 84 N.L.R.B. at 975; see note 7, *supra*. In those circumstances, the Board concluded that the fact that police could have facilitated the entry of employees into the plant was not relevant because nonstrikers were not required to enlist the assistance of police to gain access to and from the plant. 84 N.L.R.B. at 975.

Here, by contrast, the picketers at the Hayes facility had not exhibited any misconduct before the police arrived. Pet. App. 259a, 262a-263a & nn. 104, 105. Petitioner, as a precaution, summoned the police immediately upon the picketers' arrival at the facility. Arriving within minutes of petitioner's call, the police implemented procedures for the orderly ingress and egress of the Hayes facility, and the picketers observed those pro-

cedures. *Id.* at 254a, 256a, 257a-259a.[8] Petitioner's argument effectively would require the Board and the court of appeals to speculate that, had the police not arrived when they did, the picketers would have engaged in misconduct. Nothing in either of the two decisions relied on by petitioner suggests that the Board and the court of appeals, based solely on such speculation, must condone the discharge of strikers for behavior they did not in fact exhibit.

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[8] There is no merit to petitioner's assertion (Pet. 6, 14) that comments by some picketers (such as "no scabs allowed" and "[k]eep going, scabby—we're closed") show that the picketing was intended to bar entrance to the facility. As the Board has observed, "peaceful picketing unquestionably includes the right to make nonthreatening appeals to those who are about to cross a picket line." *Tube Craft*, 287 N.L.R.B. 491, 493 (1987). Nor, contrary to petitioner's characterization (Pet. 14), did the pickets form a "tight, unyielding formation." As the Board found, picketers were "at all times involved in peaceful patrolling," and at police direction they moved to allow vehicles to pass. Pet App. 262a-264a. There is no merit to petitioner's further claim (Pet. 14 n.3) that it discharged picketers at the Hayes facility because the picketing violated the Sixth Circuit's August 16, 1996, order. Not only is that assertion based on petitioner's mischaracterization of the picketing, but, as the Board observed, the issue of whether the picketing violated that order was never presented to the Sixth Circuit. Pet. App. 41a-42a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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